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IN THE

Supreme Court of the United States

JOHN DEERE INSURANCE COMPANY,
Petitioner,

v.

GUILLERMO NUEVA AND LOS ANGELES COUNTY METROPOLITAN TRANSPORTATION AUTHORITY,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Federal law requires registered interstate motor carriers to file with the Department of Transportation a proof of insurance "sufficient to pay . . . for each final judgment against the registrant." 49 U.S.C. § 13906(a)(1). Under the applicable federal regulations, insurance policies filed to satisfy this requirement incorporate, or are deemed to incorporate, the "Form MCS-90" endorsement. Promulgated by regulation, this Form provides, in relevant part, that an insurer who issues a policy to a registered motor carrier will pay "any final judgment recovered against the insured for public liability resulting from negligence in the operation, maintenance or use of motor vehicles . . . regardless of whether or not each motor vehicle is specifically described in the policy . . . ." *See* 49 C.F.R. § 387.15.

This regulatory framework requires the issuing insurer to pay any such judgment even if the vehicle involved in the loss was not covered by the base policy, and even if any other exclusions, deductibles, or limiting language would otherwise preclude coverage under that policy. At the same time, the Form MCS-90 makes clear that this obligation differs in kind from standard insurance coverage because it requires the insured to reimburse the insurer for such payments.

The question presented in this petition is:

Whether the Form MCS-90 endorsement attached to an insurance policy issued to a motor carrier requires the issuing insurer to pay a judgment entered against parties (in this case a different motor carrier and its driver) that are not entitled to coverage under the base policy, even where there is no "final judgment . . . against the insured" motor carrier named in the insurer's policy.

CORPORATE DISCLOSURE STATEMENT

Petitioner John Deere Insurance Company is a wholly owned subsidiary of Sentry Insurance Company, a publicly held company.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner John Deere Insurance Company ("John Deere"), respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit in this case is reported at 229 F.3d 853 (9th Cir. 2000), and is reprinted in the Appendix to this Petition ("App.") at App. 1a. The opinion of the United States District Court for the Central District of California (Baird, J.) is unreported and is reprinted at App. 16a.

JURISDICTION

The opinion of the Court of Appeals was issued on September 20, 2000. At timely petition for rehearing and rehearing *en banc* was denied on December 26, 2000. App. 34a. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The ICC Termination Act of 1995 is codified at 49 U.S.C. §§ 13901-13908. Pertinent provisions are reprinted at App. 36a. The regulations promulgated thereunder are published at 49 C.F.R. § 387.1-.419. Pertinent provisions are reprinted at App. 38a. The MCS-90 Endorsement, set forth at 49 C.F.R. § 387.15, is reprinted at App. 39a.

STATEMENT OF THE CASE

The ICC Termination Act of 1995 (the "Act") requires all registered motor carriers to file a bond, insurance policy, or other security "sufficient to pay . . . for each final judgment against the registrant." 49 U.S.C. § 13906(a)(1). The Act directs the Secretary of Transportation to "prescribe the appropriate form of endorsement to be appended to policies of insurance" to subject such policies to "the full security limits of the coverage required." *Id.* § 13906(f). The Secretary has promulgated regulations requiring motor carriers to file "certificates of insurance . . . conditioned to pay any final judgment recovered against such motor carrier for bodily injuries to or the death of any person." 49 C.F.R. § 387.301(a)(1). The Secretary has also prescribed the required endorsement, known as a "Form MCS-90 endorsement" ("MCS-90"), in which a motor carrier's insurer agrees to pay "any final judgment recovered against the insured for public liability resulting from negligence in the operation, maintenance or use of motor vehicles." 49 C.F.R. § 387.15. With few exceptions, the MCS-90 requires the insurer to pay all judgments entered against the insured, even if the base policy does not apply, for whatever reason.

After determining that an insurance policy issued by Petitioner to a motor carrier did not cover an accident in which Respondents sustained injuries, the district court held that the MCS-90 attached to the policy does not require Petitioner to pay a judgment entered against any party other than the insured motor carrier. The Ninth Circuit reversed, holding that the MCS-90 modifies a policy to which it applies, thereby requiring the insurer to pay judgments entered against parties who are not covered by the policy, even in the absence of a judgment against the insured motor carrier. As set forth more fully below, this Court should grant review because the Ninth Circuit's opinion ignores the plain language of the MCS-90 and the statutes and regulations that it implements,

conflicts with the majority of the decisions that have addressed the effect of the MCS-90, and exposes insurers and motor carries to liability for judgments that they have no right to contest. According to industry estimates, approximately 150,000 new MCS-90 endorsements are issued each year, thereby exposing insurers to liability for losses arising out of some 2 million combination units and nearly 6 million trucks. Accidents involving vehicles covered by the MCS-90 are very common. In 1999 alone, the Department of Transportation received reports of some 421,000 accidents involving such vehicles. As a result, the Ninth Circuit's erroneous ruling and the perverse incentives that it creates will have a significant impact on motor carriers and insurers around the country. In light of its wide-ranging and deleterious impact, and the substantial uncertainty that it has created, the decision below requires this Court's prompt review.

A. Regulatory Background.

As noted above, federal law prohibits any regulated motor carrier from engaging in foreign or interstate commerce unless it has filed a certificate of insurance or other proof of insurance "conditioned to pay any final judgment recovered against such carrier for bodily injuries to or the death of any person resulting from the negligent operation, maintenance or use of motor vehicles in transportation . . . ." 49 C.F.R. § 387.301(a)(1). Applicable law and regulations provide that motor carriers may be held vicariously liable for the negligence of their employees and parties who use their vehicles with permission. *See, e.g., Integral Ins. Co. v. Lawrence Fulbright Trucking, Inc.*, 930 F.2d 258, 261 (2d Cir. 1991) ("The language of both the statute and the implementing endorsement thus reflect an intention to furnish indemnification even where the insured carrier is adjudged only vicariously liable for the negligence of another.").

Under the federal regulatory scheme, a motor carrier that leases a vehicle must accept complete responsibility for the

operation of that vehicle. *See* 49 U.S.C. § 14102(a)(4) (authorizing Secretary of Transportation to require motor carriers who lease vehicles to "have control of and be responsible for operating those motor vehicles in compliance with requirements prescribed by the Secretary"); 49 C.F.R. § 376.12(c)(1) (a lease between an authorized motor carrier and the owner of a vehicle "shall further provide that the authorized carrier lessee shall assume complete responsibility for the operation of the equipment for the duration of the lease"). And under the laws of many states, motor carriers who operate their own vehicles, or who lease vehicles to other motor carriers, are subject to strict or vicarious liability for accidents resulting from the operation of those vehicles.[1]

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[1] *See, e.g.*, Cal. Veh. Code § 17150 (West 2000) ("Every owner of a motor vehicle is liable and responsible for death or injury to person or property resulting from a negligent or wrongful act or omission in the operation of the motor vehicle, in the business of the owner or otherwise, by any person using or operating the same with the permission, express or implied, of the owner."); Conn. Gen. Stat. Ann. § 14-154a (West 2000) ("Any person renting or leasing to another any motor vehicle owned by him shall be liable for any damage to any person or property caused by the operation of such motor vehicle while so rented or leased, to the same extent as the operator would have been liable if he had also been the owner."); Neb. Rev. Stat. § 25-21,239 (2000) ("The owner of any truck, truck-tractor, whether with or without trailer, or trailer, leased for a period of less than thirty days or leased for any period of time and used for commercial purposes, shall be jointly and severally liable with the lessee and the operator thereof for any injury to or the death of any person or persons, or damage to or the destruction of any property resulting from the operation thereof in this state"); N.Y. Veh. & Traf. Law § 388(1) (McKinney 2000) ("Every owner of a vehicle used or operated in this state shall be liable and responsible for death or injuries to person or property resulting from negligence in the use or operation of such vehicle, in the business of such owner or otherwise, by any person using or operating the same with the permission, express or implied, of such owner.").

In short, under federal and state law, motor carriers face exposure to judgments arising from the negligence of employees and other parties to whom they have entrusted vehicles that they own or hire. To guard against such judgments, and to satisfy the regulatory requirements described above, motor carriers purchase insurance policies, which require insurers to defend and indemnify covered parties for certain accidents. These policies typically include provisions that limit coverage to particular parties or vehicles, or require the satisfaction of certain conditions. For example, policies often provide that the insurer has no duty to defend or indemnify if the motor carrier does not provide timely notice of an accident, or if an accident involves particular employees or vehicles that are not listed in the policy. Other policies contain deductibles or self-insurance provisions, which oblige insurers to pay only judgments above specified dollar amounts. Given such exclusions, and the broad liability contemplated by applicable federal and state laws, standard insurance policies sometimes do not cover judgments against insured motor carriers. Thus, standing alone, these policies do not guarantee that injured members of the public will be able to recover from motor carriers liable for their injuries. And disputes between insurers and their insured motor carriers may delay the payment of judgments.

The MCS-90 protects injured members of the public by ensuring prompt payment of judgment entered against regulated motor carriers. It does so by making clear that any limitations or exclusions in the base insurance policy are ineffective against members of the public. Thus, an insurer that has issued a policy to a motor carrier must pay, up to a limit fixed by regulation (now $750,000, in most cases), "any final judgment recovered against the insured for public liability resulting from negligence in the operation, maintenance or use of [regulated] motor vehicles" 49 C.F.R. § 387.15, even if the terms of the policy would not require the payment. Under the MCS-90, an injured member of the pub-

lic may bring an action against an insurer to recover such a judgment.

But the MCS-90 does not create a windfall for the insured motor carrier. Although it requires the insurer to pay an injured member of the public in circumstances not covered by the motor carrier's insurance policy, the MCS-90 does not affect the terms of the agreement between the insurer and the insured motor carrier. That is because the MCS-90 requires the insured to reimburse the insurer for "any payment that the [insurer] would not have been obligated to make under the provisions of the policy except for the agreement contained in this endorsement." 49 C.F.R. § 387.15. At the end of the day, the MCS-90 leaves all terms, conditions, and limitations in the underlying policy in full force and effect between the insured and the insurer. Although the insurer bears initial responsibility for payment of judgments entered against the insured for matters that fall outside the policy, the MCS-90's reimbursement provision makes clear that the insured must ultimately bear the cost of such judgments.

In short, if a defendant is an "insured" entitled to coverage under the terms of a policy, the MCS-90 does not come into play. The insurer must simply defend and indemnify that party, and assume all the costs of doing so. The MCS-90 has a role only when an injured member of the public sues an insured motor carrier for injuries excluded from coverage under the terms of the base policy. In this event, the MCS-90 does not require the insurer to provide a defense or give it any right to notice of or control over the underlying litigation.[2] Rather, the MCS-90 simply requires the insurer

[2] As a practical matter, a motor carrier has ample incentive to inform its insurer when it faces such litigation, and will typically allow its insurer to participate in its defense, if the insurer wishes to do so. As discussed below, however, a driver facing such a lawsuit does not have the same incentive.

to pay a final judgment obtained in such an action, thereby ensuring that the claimant will obtain prompt compensation. But because the insurer is entitled to reimbursement from the insured, the MCS-90 does not shift the ultimate liability from the motor carrier to its insurer.

B. Factual Background.

The underlying facts are not in dispute. On November 24, 1995, a tractor/semi-trailer rig driven by Gurmukh Singh Garcha and operated by Blue Star Transportation ("Blue Star") collided with a bus owned by Respondent Los Angeles County Metropolitan Transit Authority ("LACMTA") and driven by Respondent Guillermo Nueva ("Nueva"). App. 19a. In this accident, Nueva suffered personal injuries and the bus sustained damage that rendered it a total loss. App. 3a. The tractor portion of the rig belonged to Inderjit Singh and Garcha, dba Blue Star. App. 19a. When the accident occurred, Baljit Singh Sahota, dba Sahota Trucking, owned the trailer and had agreed to sell it to Blue Star, but had not yet received payment or transferred title. App. 3a.

Prior to the accident, Sahota had purchased an insurance policy (the "Policy") from Petitioner John Deere. App. 4a. The Policy, which was in force at the time of the accident, required John Deere to pay all sums that an "insured" is legally obliged to pay for bodily injury or property damage caused by an accident resulting from the use of a covered vehicle. *Id.* In pertinent part, the Policy offers the following definition of "WHO IS AN INSURED":

> (a) You for any covered auto;
>
> (b) Anyone else while using with your permission a covered "auto" you own, hire, or borrow . . . ." App.5a.

The Policy provides that "covered autos" are "[o]nly those 'autos' described in ITEM THREE of the Declarations

for which a premium charge is shown . . . ." *Id.* Item Three of the Policy did not describe the semi-trailer involved in the accident. *Id.* Nor did it describe the attached tractor. Accordingly, as the district court and the Ninth Circuit both found, Garcha and Blue Star did not qualify as "insureds" under the Policy. Attached to the Policy was an MCS-90 Endorsement, whose pertinent portions are set forth in the appendix. *Id.*

On November 13, 1996, Nueva filed a personal injury action against Garcha, Blue Star, Sahota, Sahota Trucking, and others in the Los Angeles County Superior Court. App. 20a. On December 18, 1996, the LACMTA brought an action against the same defendants, seeking reimbursement of the property damages to the bus and workers' compensation payments to Nueva. *Id.* In that case, the LACMTA has filed defaults against Blue Star, Singh, and Garcha. *Id.*

C. District Court Proceedings.

On January 5, 1998, John Deere filed this action against several parties, including LACMTA and Garcha, seeking a declaratory judgment that it had no duty under the Policy to indemnify Garcha, Blue Star, and Sahota, among others, with respect to any liability arising from Nueva's personal injury action. App. 17a. In March 1998, LACMTA filed an answer and a cross-claim for declaratory relief. App. 17a-18a. LACMTA sought a declaration that, under the Policy, as amended by the MCS-90 endorsement, Garcha and Blue Star are "insureds" and that John Deere must therefore pay any judgment against Sahota, Garcha, and Blue Star, up to the Policy's $750,000 limit. App. 18a.

Upon cross-motions for summary judgment, the district court granted John Deere's motion for summary judgment, denied LACMTA and Nueva's motion for summary judgment, and dismissed Sahota and Sahota Trucking for lack of prosecution. App. 33a. The district court held that the Pol-

icy did not cover the operators of the tractor/trailer as "insureds" and that the MCS-90 did not alter the policy in any relevant respect. App. 29a. The court acknowledged that the MCS-90 establishes a "reimbursable obligation" requiring John Deere to make certain payments on behalf of its named insured, Sahota, that the Policy would not otherwise mandate. *Id.* However, the court held that the MCS-90 did not create "coverage" for Garcha and Blue Star, who, as users of non-scheduled vehicles, had no independent protection under the Policy. *Id.*

The district court relied on the Ninth Circuit's prior decision in *Harco Nat'l Ins. Co., v. Bobac Trucking, Inc.*, 107 F.3d 733 (9th Cir. 1997). The court read *Harco* as distinguishing between the "coverage" provided by an insurance policy and a separate "reimbursable obligation" imposed by an MCS-90. App. 27a. As Garcha and Blue Star were not named insureds and drove a non-covered auto, the court concluded that John Deere owed no duty to indemnify them: "The MCS-90 . . . [does] not vary the terms of the policy so as to create 'coverage' where it did not formerly exist; [it] impose[s] only a reimbursable obligation as to final judgments rendered against the named insured." App. 32a.

D. The Ninth Circuit's Decision.

The Ninth Circuit reversed. App. 15a. The court began by examining the terms of the Policy, and agreed with the district court that Sahota's trailer was not a "covered auto." App. 5a. As a result, the court found that, as "permissive users of a non-covered auto," Garcha and Blue Star "are not 'insureds' per the underlying policy's express terms." *Id.* The court then turned to the question that requires this Court's review: Whether, in the absence of a judgment against the insured motor carrier, the MCS-90 endorsement changes the terms of the Policy and requires John Deere to indemnify parties not included in its coverage.

The court answered that question in the affirmative. The court began by rejecting the district court's reliance on *Harco*. The court distinguished *Harco* in three ways. First, it noted that *Harco* simply held that the MCS-90 does not create a duty to defend, and that this ruling is irrelevant to the question whether the MCS-90 imposes a duty to indemnify. App. 9a. Second, the court said that the MCS-90 does not speak directly to the duty at issue in *Harco*, but that it does explicitly require an insurer to "indemnify its insured for non-covered autos." *Id.* Third, the court pointed out that *Harco* involved a dispute between an insured and its insurer, rather than a claim by an injured member of the public against an insured. *Id.* As a result, the court felt that the "policy considerations inherent in this dispute" did not play a role in *Harco*. App. 10a.

Finding its own precedent unpersuasive in this context, the court instead relied upon *Adams v. Royal Indem. Co.*, 99 F. 3d 964, 968 (10th Cir. 1996), a case it perceived as having "nearly identical facts." App. 11a. The court agreed with the Tenth Circuit's conclusion that the MCS-90 "indirectly modifie[s]" the insurance policy's definition of "insured" by expanding that term to include permissive users of any vehicle owned, hired, or borrowed by the insured, regardless whether the vehicle is a "covered auto" under the policy. App. 12a.

In reaching this conclusion, the court focused on the following "critical language" from the MCS-90: "[T]he insurer agrees to pay . . . any final judgment recovered against the insured for public liability . . . *regardless of whether or not each motor vehicle is specifically described in the policy* . . . ." App. 13a (emphasis in original). The court regarded the italicized language as indicating that if a policy limits its protection to "covered" or "specified" autos, this limitation "ceases to operate when an injured member of the public seeks indemnification on behalf of the 'insured.'" *Id.*

Petitioner argued that the preceding language, requiring payment of "any final judgment rendered against the insured," referred only to the insured motor carrier named in the Policy. App. 13a. Thus, petitioner claimed that its obligation to make payments under the MCS-90 is triggered only by the entry of judgment against Sahota. The Ninth Circuit rejected this argument. App. 14a. Instead of confronting the language and structure of the MCS-90 and the underlying statute and regulations, the court reached its conclusion by constructing a syllogism.

Beginning with the uncontested proposition that the MCS-90 would require John Deere to pay a judgment entered against Sahota – its named insured motor carrier – if he were involved in accident while driving a non-covered auto, the court assumed that this obligation would arise because the MCS-90 modifies the Policy's definition of an "insured" from "You for any covered auto" to "You for any auto." The court saw no reason to hold that MCS-90 has a different effect on the Policy's two definitions of "Who is an Insured." *Id.* Having reached that point, the court felt that it would be anomalous for the MCS-90 to modify the definition of "insured" with respect to the named insured, yet not its permissive users. *Id.*

Finally, the court invoked public policy considerations to support its ruling. The court pointed out that its interpretation of the MCS-90 carries out the statutory goal of ensuring that an insurer is available to pay judgments against motor carriers for damages to injured members of the public. *Id.*

Having concluded that the MCS-90 modified the Policy by making Garcha and Blue Star "insureds," the court held that, even without a judgment against its named insured, John Deere is liable to Respondents for a judgment against Garcha and Blue Star, up to the Policy maximum. App. 15a.

REASONS FOR GRANTING THE WRIT

The Ninth Circuit's decision raises an important question about the effect of a federally mandated endorsement that is attached to millions of vehicles in circulation around the country. In holding that an insurer of a certified motor carrier may be liable under the MCS-90 without the entry of a judgment against it, the Ninth Circuit has ignored the plain language of the MCS-90 and the text and regulations that it is designed to implement. By joining the Tenth Circuit in this erroneous interpretation, the Ninth Circuit has exacerbated an existing conflict of authority.

The Ninth Circuit's approach stands in direct conflict or considerable tension with longstanding rulings of the Third, Fifth, Eighth, and D.C. Circuits. These courts have all made clear that, although the MCS-90 requires insurers of motor carriers to make reimbursable payments to satisfy judgments against those motor carriers, it does not change the policy definition of "an insured" or impose such liability without a judgment against the motor carrier named in its policy.

The Ninth Circuit's departure from this sensible rule creates an inequitable situation for both insurers and motor carriers. Under the Ninth Circuit's approach, an insurer must pay judgments against permissive users of vehicles of its insured motor carrier, but has no right to participate in the defense of the underlying actions against those users. In a typical insurance claim, the insured party is entitled to coverage only if it notifies the insurer promptly of the claim and allows it to control any litigation. But the Ninth Circuit's approach gives insurers no such right and creates a perverse incentive for drivers to accept settlements or default judgments. Insurers must pay these obligations, and their insured motor carriers must reimburse them, but neither the motor carriers nor the insurers have any right to contest the underlying liability or the amount of the damages. And because

the MCS-90 requires them to reimburse their insurers for such payments, motor carriers may be saddled with judgments that they had no opportunity to contest. The Ninth Circuit rule thus creates perverse incentives and invites collusive arrangements and tangible unfairness.

As noted above, the question presented arises with great frequency throughout the country. The MCS-90 is attached to insurance policies on millions of vehicles that travel throughout the United States. In 1999 alone, the Department of Transportation received reports of approximately 421,000 accidents involving vehicles subject to the MCS-90. Accordingly, this issue arises constantly, and the present division of authority creates real uncertainty for insurers and motor carriers. In short, this petition raises an important question that has divided the courts, that will recur frequently, and that has significant practical effects throughout the country. The Court should therefore grant certiorari to review the opinion of the Ninth Circuit.

I. THE NINTH CIRCUIT'S INTERPRETATION OF THE MCS-90 CONFLICTS WITH ITS TEXT AND PURPOSE, AND WITH THE STATUTE AND REGULATIONS THAT IT IS DESIGNED TO ENFORCE.

The Ninth Circuit held that the MCS-90 alters the terms of insurance policies to which it applies, requiring an insurer of a motor carrier to pay judgments against permissive users of its vehicles, even in the absence of any judgment against the insured motor carrier. This overbroad interpretation of the MCS-90 conflicts with its plain language, and with the statute and regulations that gave rise to it. To explain this conflict, and also to make clear the extent of the division between the Ninth Circuit and other courts that have interpreted the MCS-90, we briefly describe the broader framework for regulating the insurance of motor carriers.

1. Federal law has created a simple system to ensure that members of the public receive compensation for injuries sustained in accidents involving interstate motor carriers. Since the enactment of the Interstate Commerce Act ("ICA") in 1935, federal law has required certain interstate motor carriers to file a bond or proof of insurance to ensure adequate coverage for injuries to members of the public. Though they have applied to different categories of motor carriers, these laws -- and the regulations promulgated to enforce them -- have always spoken with perfect clarity about the scope and purpose of the required insurance. Simply stated, covered motor carriers must maintain sufficient funds or insurance to pay judgments entered *against themselves* for injuries to the public caused by negligence in the operation or maintenance of motor vehicles.

For example, the ICA provided that a motor carrier could not obtain a certificate or permit without posting proof of insurance "conditioned to pay . . . any final judgment *recovered against such motor carrier*." 49 U.S.C. § 315 (1976) (emphasis added). The regulations promulgated by the Interstate Commerce Commission under the ICA reflected exactly the same purpose, providing that no common carrier could receive an operating certificate without filing a bond or other proof of insurance "conditioned to pay any final judgment *recovered against such motor carrier* for bodily injuries to or the death of any person resulting from the negligent operation, maintenance or use of motor vehicles in transportation. . . ." 49 C.F.R. § 1043.1 (1996) (emphasis added). Similarly, the Motor Carrier Act of 1980 ("MCA") required a motor carrier to file a security "sufficient to pay . . . for each final judgment *against the carrier* for bodily injury to, or death of, an individual resulting from the negligent operation, maintenance or use of motor vehicles." 49 U.S.C. § 10927 (1994) (emphasis added).

The ICC Termination Act, which replaced the MCA in

1996 and now governs interstate motor carriers, does not deviate from this longstanding approach. *See* 49 U.S.C. § 13906(a)(1) (requiring registrants to file a security "sufficient to pay . . . for each final judgment *against the registrant*") (emphasis added). Likewise, the regulations implementing the Act prohibit motor carriers from operating without proof of insurance "conditioned to pay any final judgment *recovered against such motor carrier*." 49 C.F.R. § 387.301(a)(1) (emphasis added).

In short, the MCS-90 and its predecessor, the form BMC-90 endorsement, were designed to ensure that insurance policies obtained by motor carriers are in fact sufficient to pay judgments entered against them, up to the amount required by statute or regulation. As the Ninth Circuit observed, the MCS-90 protects the public by ensuring that registered motor carriers have the means to pay all judgments entered against them. It also ensures that exclusions in particular insurance policies do not operate to the detriment of the injured public. Thus, if an insurer ordinarily would not have to pay a judgment because it arose from a vehicle that was not covered by the policy, the MCS-90 would protect the public by requiring the insurer to pay the judgment. However, the MCS-90 makes clear that, in such cases, the insured motor carrier must reimburse the insurer.

The ICA, the MCA, and the ICC Termination Act of 1995, and the regulations promulgated thereunder, all envision a simple system. To obtain operating permits and licenses, regulated motor carriers must prove that they have the means to pay judgments entered against them on account of public injury. The MCS-90 attached to the relevant policies ensures that the insurer will pay *all* judgments entered against the insured motor carrier, regardless of any limitations contained in the policy. Moreover, under the overall statutory scheme, a motor carrier is liable for more than its own negligence. *See Integral Ins. Co. v. Lawrence Fulbright*

Trucking, Inc., 930 F.2d 258, 261 (2d Cir. 1991) ("The language of both the statute and the implementing endorsement thus reflect an intention to furnish indemnification even where the insured carrier is adjudged only vicariously liable for the negligence of another."). Thus, though the MCS-90 requires an insurer to pay only judgments against its insured motor carrier, it provides substantial protection for the public. As forms of vicarious and strict liability are available under state and federal law, injured members of the public can obtain judgments against motor carriers for the conduct of employees and others entrusted with vehicles. When they do so, the MCS-90 makes clear that insurers must pay those judgments, and may then obtain reimbursement from insured motor carriers for any payments that were not required by the policy. But the statue, regulations, and MCS-90 all make clear that entry of judgment *against the insured motor carrier* is the event that triggers the insurer's obligation to pay.

2. The Ninth Circuit's interpretation of the MCS-90 confuses this simple scheme and expands the insurers' liability beyond the scope contemplated by the Act and its implementing regulations. Though the Act explicitly requires insurance for "judgments against the registrant," 49 U.S.C. § 13906(a)(1), and the regulations require insurance "to pay any final judgment recovered against such motor carrier," 49 C.F.R. § 387.301(a)(1), the court strayed far from this plain language and vastly expanded insurers' obligations. Divorcing the MCS-90 from its statutory context, the Ninth Circuit read the MCS-90 as creating a whole new category of "insureds" under the Policy and then held that the MCS-90 requires the payment of any judgment on behalf of any of these newly minted "insureds."

The Ninth Circuit's convoluted interpretation of the MCS-90 conflicts not only with the background statutory scheme, but also with the text and structure of the MCS-90

itself.[3] Although the MCS-90 does not employ the phrase "named insured," its uses "insured" in a way that makes quite clear that that term refers to the insured motor carrier, and not any party entitled to coverage under the Policy. First, the MCS-90 begins by making clear that its effect is "to assure compliance by the insured, within the limits stated herein, *as a motor carrier of property*, with [the applicable law and regulations]." 49 C.F.R. § 387.15 (emphasis added). Thus, the "insured" to whom the MCS-90 refers is plainly a "motor carrier." Drivers and other hired employees who may receive coverage under motor carriers' policies are simply not "motor carriers." Accordingly, the MCS-90 necessarily uses "the insured" to refer to the motor carrier, and not to every party who may be covered under the base policy, let alone to other parties who fail even to qualify as "insureds" under that policy.

Second, the MCS-90 creates an agreement between the insurer and the motor carrier that it insures. The relevant portion begins with the statement that "[i]n consideration of the premium stated in the policy to which this endorsement is attached, the insurer (the company) agrees to pay . . . any final judgment recovered against the insured for public liability." *Id.* Later, the MCS-90 repeatedly notes that certain facts are "understood" and agreed between the insurer and the insured. Of particular importance, the "insured agrees to reimburse the company for any payment made by the company on account of . . . any payment that the company would not have been obligated to make under the provisions of the policy except for the agreement contained

[3] Indeed, in a decision that the Ninth Circuit affirmed by unpublished opinion, one district court interpreted the MCS-90's use of the term "insured" as referring only to the named insured: "The language of the endorsement, the relevant federal regulations, and the intent of the parties all indicate that the term 'insured' refers only to the named insured." *Del Real v. United States Fire Ins. Crum & Forster*, 64 F. Supp. 2d 958, 964 (E.D. Cal. 1998), *aff'd*, 188 F.3d 512 (9th Cir. 1999).

policy except for the agreement contained in this endorsement." *Id.*[4]

Such language makes clear that, consistent with the overall regulatory structure in which it operates, the MCS-90 simply expands the agreement, set forth in the underlying policy, between the insurer and insured. In consideration for the policy premium, the insurer agrees to pay any judgments for public liability against "the insured," even if the terms of the policy would exclude such payments. However, "the insured" agrees to reimburse the insurer for any payments that the policy would not have required. Because persons incidentally insured under the Policy were not parties to the insurance contract and did not pay any consideration or accept a corresponding obligation to reimburse the insurer, one must necessarily read the MCS-90's use of "the insured" to refer only to the motor carrier named in the Policy. Indeed, this reading finds further support in the fact that the MCS-90 makes consistent use of the definite article, speaking only of "the" insured. The omission of any reference to "an" insured confirms that the MCS-90 applies only to the named insured, and not to all parties entitled to coverage under a policy.

Third, if one reads the term "insured" as referring to any party entitled to coverage under the underlying policy, the MCS-90 becomes largely superfluous. By definition, if a party is an "insured" under a standard motor vehicle insurance party, then the insurer has a duty to defend and indemnify it. As a result, the MCS-90 serves no purpose with respect to such "insureds," whom the insurer must already in-

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[4] This reimbursement provision contravenes the fundamental rule of insurance coverage that an insurer may not subrogate against its own insured. This extreme divergence from standard practice makes clear that the MCS-90 is a departure from traditional notions of coverage, and offers strong evidence that, contrary to the view of the Ninth Circuit, the broad, omnibus definition of "insured" contained in the underlying policy has no place in the MCS-90.

demnify. In contrast, as discussed above, the motor carrier named in a standard policy is not always entitled under that policy to coverage for all accidents and judgments against it. It is therefore most sensible to read the MCS-90 as providing the public with protection in that category of cases.

If one examines the language in the MCS-90 in conjunction with the statute and regulations that it implements, it becomes clear that this is the proper interpretation. As already noted, the statute and regulations are absolutely clear in requiring regulated motor carriers to obtain insurance to cover judgments *against themselves*, not judgments against third parties. *See* 49 U.S.C. § 13906(a)(1) (motor carriers seeking to register must file a security "sufficient to pay . . . for each final judgment *against the registrant*")(emphasis added); 49 C.F.R. § 387.301(a)(1) (motor carriers may not operate without proof of insurance "conditioned to pay any final judgment recovered *against such motor carrier*")(emphasis added). As the MCS-90 was promulgated to effectuate this clear directive, there is simply no basis for interpreting it to create coverage broader than that which the underlying statute and regulations require. Thus, the term "insured" can only refer to the named insured, *i.e.*, the registering motor carrier whom the statute obliges to obtain insurance.

By failing to examine the MCS-90 in its proper context, the Ninth Circuit construed its language in a convoluted manner that imposes liability far beyond the contemplation of the statute. Because the Ninth Circuit's holding conflicts with language of all the relevant provisions and creates considerable uncertainty, this Court should grant review and restore the system required by statute.

II. THE NINTH CIRCUIT'S RULING CONFLICTS WITH THE HOLDINGS OF SEVERAL COURTS OF APPEALS THAT AN INUSURER'S OBLIGATION UNDER THE MCS-90 IS TRIGGERED ONLY BY THE ENTRY OF A JUDGMENT AGAINST ITS INSURED MOTOR CARRIER.

For almost 50 years, federal courts of appeals were essentially unanimous in the view that an insurer's obligation under the MCS-90 (and its predecessor, the BMC-90) is triggered only by the entry of judgment against the motor carrier named in the insurance policy to which it is attached. The Ninth Circuit's decision in this case, and prior rulings by the Tenth Circuit, have destroyed this unanimity and created a conflict ripe for resolution by this Court.

1. As long ago as 1952, the Court of Appeals for the D.C. Circuit explicitly rejected the Ninth Circuit's rule and the logic that underlies it. In *National Mutual Insurance Co. v. Liberty Mutual Insurance Co.*, 196 F.2d 597 (D.C. Cir.), *cert. denied*, 344 U.S. 819 (1952), the court held that the then required "ICC endorsement," which was in all material respects identical to the MCS-90, did not modify the definition of "insured" in the underlying policy. The owner-operator of a trailer-truck had leased his vehicle to another motor carrier, for whom he operated the vehicle. As required by law, both the owner-operator and the lessee-carrier had insurance. The latter policy, which included an ICC endorsement, defined the "insured" as "the named insured and also . . . any person while using the an owned automobile or a hired automobile," but specifically excluded the owner of any "hired vehicle." After the victim of a highway accident obtained a judgment against the owner-operator, but not the motor carrier, the owner-operator's insurer brought an action against the motor carrier's insurer, claiming that the operator was an "insured" under its base policy.

The court rejected this claim, noting first that, under the terms of that policy, "if an injured party sues the named insured . . . and recovers, the insurance company will be liable; but if he brings suit solely against the owner of a hired vehicle . . ., the company assumes no responsibility either to the owner of the vehicle or to the injured party." *Id.* at 599. The court then concluded that the ICC endorsement did not change this basic result. After reviewing its operating language, and noting that the endorsement was designed to protect members of the public, the court observed that although "it doubtless would have enured to the benefit of [the victim], had she chosen to sue [the motor carrier]," the endorsement does not "shift the [owner-operator's] liability to [the motor carrier's] insurer" or "make [the owner-operator] an 'insured' under the [motor carrier's] policy." *Id.* at 600. In so doing, the court emphasized that the definition of an "insured" remains "governed by the express provisions of the body of the contract." *Id.*

The D.C. Circuit's *National Mutual* opinion established two essential points. First, an insurer could be required to make payment under the predecessor of the MCS-90 only upon the entry of judgment against its insured motor carrier. Thus, to obtain the benefit of the MCS-90, the injured party must obtain a judgment against the insured motor carrier. Second, the endorsement does not change the definition of "insured" under the contract. In the case below, the Ninth Circuit rejected both of these principles, which were essential to the *National Mutual* rule.

In *Wellman v. Liberty Mutual Insurance Co.*, 496 F.2d 131 (8th Cir. 1974), the court followed the D.C. Circuit's basic approach and reasoning. In direct conflict with the Ninth Circuit, the Eighth Circuit held that the liability of an insurer of an interstate motor carrier under the MCS-90 and the relevant regulations is triggered only by the entry of judgment against the insured motor carrier. In *Wellman*, the

motor carrier leased a vehicle from an owner-operator who was later involved in an accident that injured a member of the public. This accident occurred while the owner-operator was hauling a load for another company. The injured party did not sue the insured motor carrier. Instead, after obtaining a default judgment against the owner-operator, she brought an action to recover directly from the motor carrier's insurer. The court found that the motor carrier's policy did not cover the owner-operator because it contained a provision excluding coverage unless the covered vehicle was used "exclusively in the business of the named insured." *Id.* at 137.

The injured party argued that, in light of the I.C.C. endorsement and regulations, the court should construe this exclusion narrowly. The court rejected this position, observing that "the relevant I.C.C. regulation . . . contains no provision which would require a motor carrier specifically to carry insurance affording liability coverage for judgments rendered solely against an owner-operator of a vehicle leased to the motor carrier." *Id.* at 138. As a result, the court deemed it "unreasonable" to use the regulations and public policies of the ICA "as a gloss to the exclusionary provisions of the insurance policy." *Id.* at 138-39. The court felt that the parties could not have contemplated "such broad coverage" and that it could not make the "unwarranted assumption that [the parties] somehow intended the apparent and obvious meaning of the endorsement to be inoperative and to be controlled instead by an I.C.C. regulation which in no way relates to or binds insurance companies." *Id.* In short, though noting that the insurer would have been liable if the injured party had obtained a judgment against its insured motor carrier, the court refused to make the "unjustified and illogical leap" of holding that an insurer "should be bound to pay a judgment for others who are not mentioned in the I.C.C. insurance regulation . . . and who are specifically excluded by the language of the policy." *Id.*

Though the Eighth Circuit did not directly construe the language of the predecessor of the MCS-90, its understanding of the underlying statute and regulations conflicts directly with the approach of the Ninth Circuit. The Eighth Circuit succinctly summarized its basic rule: "Since there was no judgment against the [insured motor carrier], the regulations which . . . require insurance coverage for judgments against the carrier . . . may not be read into the insurance policy to impose liability upon the insurer of the motor carrier in contravention of the precise, express terms of the policy." *Id.* Yet the Ninth Circuit's reading of the MCS-90 has precisely this effect. In the absence of any judgment against its insured, and despite regulations that require insurance only for such judgments, John Deere is required to pay a judgment against parties unmentioned by the regulations and specifically excluded from the Policy.

The Fifth Circuit has also held that an injured party may recover from a motor carrier's insurer only upon entry of a judgment against the motor carrier. In *White v. Excalibur Insurance Co.*, 599 F.2d 50, 55 (5th Cir.), *cert. denied*, 444 U.S. 965 (1979), a motor carrier leased trucks and hired drivers from an owner-operator. An employee of the owner-operator died in a crash caused by another employee, who had fallen asleep at the wheel. The mother of the deceased employee obtained a judgment against the surviving driver, and then sought to collect from the carrier's insurer. Citing 49 U.S.C. § 315, the predecessor of the statute that now requires motor carriers to file insurance with the Department of Transportation, the Fifth Circuit held that "in order for [the insurer] to be liable under the policy filed by [the motor carrier] with the ICC, [the motor carrier] must first be adjudicated liable as a party." *Id.* As a result, the court held that the plaintiff was "barred from recovering from [the insurer] due to her failure to secure a judgment against the insured motor carrier." *Id.* The Ninth Circuit's construction of the MCS-90 makes the motor carrier's insurer liable without the

entry of judgment against the motor carrier, and therefore conflicts with the Fifth Circuit's holding and its understanding of the statutory scheme.

The Third Circuit has joined the majority of the courts by indicating that federal law governing motor carriers, including the predecessor to the MCS-90, does not require an insurer to pay judgments entered against parties other than its own insured. In *Carolina Casualty Insurance Co. v. Insurance Co. of North America*, 595 F.2d 128, 139 (3d Cir. 1979), an interstate motor carrier leased a tractor-trailer from its owner, and employed a driver of its own. Both the motor carrier and the owner had insurance policies, with the former including the BMC-90 endorsement. After an accident involving the trailer, the injured parties brought a personal injury action in state court against the owner, the motor carrier, and their respective insurers. The owner and his insurance company then brought a federal action seeking a declaratory judgment that the BMC-90 and the accompanying federal regulations made the motor carrier's insurance the "primary" policy.

The Third Circuit rejected this view, holding that "neither the federal motor carrier laws nor the (imputed) ICC endorsement . . . transfer to [the motor carrier's insurer] the duties to defend claims . . . *or to pay judgments entered against others*." *Id.* (emphasis added). In reaching this conclusion, the court focused on the fact that the governing statute and regulation "require only that the carrier give security 'to *Pay* any final judgment recovered *against such motor carrier*.'" *Id.* (emphasis in original). The court also noted that these authorities say "nothing about payment of judgments recovered against other parties." *Id.*

Although the Third Circuit addressed these issues in the context of a lawsuit between insurers, its holding and logic stand in direct conflict with the Ninth Circuit's approach. As the Third Circuit emphatically made clear, nothing in the ap-

plicable law, regulations, or the ICC endorsement requires a motor carrier's insurer to pay a judgment against anyone other than its own insured. This view is flatly inconsistent with the approach of the Ninth Circuit's holding that the MCS-90 both expands the policy definition of insured and requires an insurer to pay without the entry of judgment against its named insured.

2. For reasons already discussed, the decisions of the Third, Fifth, Eighth, and D.C. Circuit's conflict with the decision of the Ninth Circuit in this case. Those decisions also conflict with a decision of the Tenth Circuit, which stands alone in sharing the Ninth Circuit's expansive view of the language and effects of the MCS-90. In *Adams v. Royal Indemnity Co.*, 99 F.3d 964, 970 (10th Cir. 1996), the court held that the MCS-90 "indirectly modifies 'insured' as defined in the basic policies." There, an injured party had obtained a default judgment against the permissive user of a vehicle that was owned by an insured motor carrier, but was not listed in the motor carrier's policy. Although the injured party had not obtained a judgment against the insured motor carrier, and although the court found that the driver was not an "insured" under the terms of the motor carrier's policy, the court held that the injured party could nevertheless recover directly from the insurer, on the theory that the MCS-90 had enlarged the policy's definition of an "insured." Like the opinion of the Ninth Circuit below, *Adams* fundamentally misunderstands the operation of the MCS-90 and the protection it affords. In doing so, it rejects the logic of at least four courts of appeals and contributes to a profound conflict that requires this Court's resolution.

3. The decisions described above reveal that the courts of appeals have fundamental differences in their understanding of the system of insuring federally regulated motor carriers. Review of this case would afford the Court with the opportunity to provide needed guidance and to resolve the con-

troversy over the meaning and effect of the MCS-90.

III. THE ISSUE PRESENTED BY THIS CASE IS IMPORTANT AND RECURRING.

The Ninth Circuit's ruling is fundamentally unfair both to insurance companies and to the motor carriers that they insure. Under the Ninth Circuit's reading of the MCS-90, a party injured in an accident with a vehicle covered by that endorsement may recover from the insurer without obtaining a judgment against its insured motor carrier. This rule may lead injured parties to seek default judgments against or settlements with the drivers of covered vehicles, without suing the motor carrier or the insurer. Knowing that insurance companies will have to pay such settlements and judgments, drivers will have little incentive to contest the merits of the underlying lawsuits. Unlike motor carriers, who will wish to avoid the MCS-90's reimbursement requirement, drivers face no liability or obligations to insurers, and thus will frequently choose simply to settle cases or accept default judgments. Insurers will have no contractual right to force them to do otherwise.

As a result, the Ninth Circuit's rule creates a series of perverse incentives that will expose insurers to liability without giving them the right or opportunity to defend the underlying claims. This rule will also have adverse effects upon motor carriers, for it is undisputed that the MCS-90 requires them, as the "insureds" under the policies, to reimburse their insurers for any payments that would not have been necessary in the absence of the MCS-90. Thus, motor carriers, like insurers, may be required to bear the costs of judgments that they were unable to contest. In short, the Ninth Circuit's approach invites collusion between drivers and parties injured in collisions with them, and seems certain to lead to manifest unfairness.

One brief example may illustrate the problems that the Ninth Circuit's rule will likely engender. As its text makes clear, the MCS-90 requires payment only of judgments for injuries caused by negligence in the operation or maintenance of motor vehicles. Thus, a party injured by the intentional tort of a driver may file a complaint alleging negligent injury and obtain a default judgment on that ground. Neither the motor carrier that employed the driver nor its insurer will have had the right to contest the finding of negligence. Yet when that injured party seeks to collect from the insurer under the Ninth Circuit's interpretation of the MCS-90, the insurer will be obliged to pay, without having a day in court. And the insurer's payment may in turn require the insured motor carrier to reimburse it.

The Ninth Circuit's misreading of the MCS-90 creates an additional unfairness that stands the regulatory scheme on its head. As discussed above, properly construed, the MCS-90 does not require insurers of motor carriers to assume the ultimate costs of judgments that were not covered by the terms of their policies. Though an insurer must make an initial payment, it is entitled to reimbursement of such payments from its insured motor carrier. But the Ninth Circuit's approach requires insurers to pay judgments entered against third parties (like drivers) who may not be subject to the MCS-90's reimbursement requirement. Because drivers and other employees are not parties to the underlying insurance policies, insurers may not be able to obtain reimbursement for payments made on their behalf under the MCS-90. Without any warrant in the text of the Act, the regulations, or the MCS-90, the Ninth Circuit has vastly expanded the liability of insurers.

Such problems are likely to occur with increasing frequency around the country. As noted above, no less than 150,000 MCS-90 endorsements are filed each year, and they apply to insurance policies that cover as many as 6 million

vehicles. In 1999, there were approximately 421,000 accidents involving vehicles covered by the MCS-90. The case law reflects the fact that the MCS-90 plays a frequent role in litigation concerning trucking accidents. A search of the federal and state cases in the Westlaw database reveals dozens of appellate and trial court opinions involving the MCS-90 in the last several years. In light of these numbers, it is quite clear that the issue presented in this case will recur time and time again.

Given the interstate movement of the covered vehicles and the nationwide reach of the insurance companies and their policies, two things are certain. First, the essential conflict between the courts of appeals will only intensify. Second, until this Court resolves the conflict, insurers and motor carriers will face the basic unfairness described above, and will also have to deal with tremendous uncertainty. Since they can never predict where vehicles owned by covered carriers will have accidents, insurers will have no way accurately to assess their likely liabilities. To remove the uncertainty generated by the existing divergence of authority, the Court should grant certiorari and lay down a uniform rule.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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Dated: March 26, 2001

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 98-56464

D.C. No. CV-98-00036-LGB

JOHN DEERE INSURANCE COMPANY,

an Illinois corporation,

Plaintiff-cross-defendant-Appellee,

v.

GUILLERMO NUEVA, *Defendant-Appellant,*

LOS ANGELES COUNTY METROPOLITAN TRANSPORTATION AUTHORITY,

Defendant-cross-claimant-Appellant,

and

JOO SANG LEE, DEDRIC MANGUM, RASHPAL SINGH, GURMUKH SINGH GARCHA, BLUE STAR TRUCKING, aka Blue Star Transportation, INDERJIT SINGH, SOUTHWESTERN CARRIERS, BALJIT SAHOTA, PROGRESSIVE NORTHWESTERN INSURANCE COMPANY, TARSEM SINGH,

Defendants-Cross-defendants.

OPINION

Appeal from the United States District Court for the Central District of California, Lourdes G. Baird, District Judge, Presiding.

Argued and Submitted

April 4, 2000—Pasadena, California

Filed September 20, 2000

Before: Procter Hug, Jr., Chief Judge, Warren J. Ferguson, Circuit Judge, and Jane A. Restani,[1] Court of International Trade Judge.

Opinion by Chief Judge Hug

COUNSEL

Jacqueline Jordan Leung, Boornazian, Jensen & Garthe, Oakland, California, for the appellants.

Garth Goldberg, Wilson, Kenna & Borys LLP, Los Angeles, California, for the appellee.

OPINION

HUG, Chief Judge:

We are asked to decide whether a federally mandated endorsement to an insurance policy creates a duty on the part of an insurer to indemnify a permissive user of an auto not covered by the underlying policy for injuries he negligently caused to members of the public. The district court found that the endorsement did not modify the policy to require indemnification and granted summary judgment for the insurer. This is an issue of first impression for this circuit. We have jurisdiction pursuant to 28 U.S.C § 1291, and for the following reasons, we reverse the district court judgment.

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[1] The Honorable Jane A. Restani, Judge of the Court of International Trade, sitting by designation.

BACKGROUND

This appeal arises out of an underlying personal injury action entitled *Nueva v. Garcha, et. al.*, Los Angeles County Superior Court Case No. TC 009762 ("underlying action"). The underlying facts, which are not in dispute, are that a tractor/semi-trailer operated by Gurmukh Singh Garcha ("Garcha") and Blue Star transportation ("Blue Star") rear-ended a Los Angeles County Metropolitan Transit Authority ("LACMTA") bus operated by Guillermo Nueva ("Nueva") (collectively "Appellants"). The collision resulted in a total loss to the bus and personal injuries to Nueva.

The tractor/semi-trailer unit was being driven by Garcha. The tractor was owned by Inderjit Singh ("Singh") and Garcha dba Blue Star, who are uninsured and not involved in this appeal. This appeal revolves around the liability associated with the other vehicle, the Great Dane semi-trailer ("trailer"), which was owned by Baljit Singh Sahota dba Sahota Trucking ("Sahota"). Sahota is John Deere's named insured. Prior to the accident, Sahota had agreed to sell the trailer to Blue Star, but the title had not yet transferred because the final payment had not been made. Sahota's policy with John Deere included a federally mandated MCS-90 endorsement, whose scope is the subject of this appeal.

On January 5, 1998, John Deere filed a complaint against several parties, including LACMTA and Nueva, seeking a declaration that John Deere had no duty, pursuant to a policy of insurance it issued to Sahota, to indemnify Sahota, Garcha, and Blue Star, among other parties, with respect to any liability arising out of the underlying action filed by Nueva. On March 20, 1998, LACMTA filed an answer to the complaint and a cross claim for declaratory relief against John Deere. LACMTA asked for a declaration that, with respect to the John Deere policy, Garcha and Blue Star are 'insureds' pursuant to the MCS-90 endorsement to the policy and the

California permissive user statute, thus requiring John Deere to pay judgment against Sahota, Garcha, and Blue Star, subject to a limit of $750,000.

The parties both made motions for summary judgment. On July 6, 1998, the district court issued an order granting John Deere's motion for summary judgment, denying LACMTA and Nueva's motion for summary judgment and dismissing Sahota and Sahota Trucking for lack of prosecution. The district court found that the insurance policy did not cover the operators of the tractor/trailer combination vehicle as "insureds" because the MCS-90 endorsement created merely a "reimbursable obligation" with respect to payments on behalf of its insured, Sahota, but did not create "coverage" for Garcha and Blue Star, who it classified as users of non-scheduled vehicles. The judgment was entered October 15, 1998. LACMTA and Nueva appeal.

STANDARD OF REVIEW

We review a grant of summary judgment de novo. *Robi v. Reed,* 173 F.3d 736, 739 (9th Cir.1999).

THE JOHN DEERE POLICY

We begin with an examination of the relevant terms and provisions of the policy itself. The John Deere Policy was issued to Sahota on or about August 21, 1995 and was in force at the time of the accident. The policy obligated John Deere to pay all sums that an "insured" is legally obligated to pay for bodily injury or property damage caused by an accident and resulting from the use of a covered automobile under the policy.

The policy's relevant definition of "WHO IS AN INSURED" is as follows:

(a) You for any covered auto;

(b) Anyone else while using with your permission a covered "auto" you own, hire or borrow . . ."

The focus of our inquiry is John Deere's obligation to indemnify Garcha and Blue Star, who were permissive users of Sahota's trailer. We will therefore focus on the definition of "insured" contained in part (b), which limits permissive user coverage to "covered autos".

We thus turn to the question of what is a "covered auto". Section I of the policy entitled COVERED AUTOS defines SPECIFICALLY DESCRIBED "AUTOS" as follows:

> Only those "autos" described in ITEM THREE of the Declarations for which a premium charge is shown (and for Liability Coverage any "trailers" you don't own while attached to any power unit described in ITEM THREE).

Neither the trailer nor any other vehicle or portion of any vehicle involved in this accident was listed in ITEM THREE of Sahota's policy.[2]

Therefore, as a threshold matter, we note that the trailer is not a covered auto. Consequently, since Garcha and Blue Star were permissive users of a non-covered auto, they are not "insureds" per the underlying policy's express terms. However, our inquiry does not end here. The John Deere Policy was amended and supplemented by form MCS-90 endorsement for Motor Carrier Policies of Insurance For Public Liability Under Sections 29 and 30 of the Motor Car-

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[2] The fact that the vehicle involved in this accident is the Great Dane trailer is of no import because the policy's definition of "automobile" includes trailers.

rier Act of 1980,[3] ("MCS-90") as required at the time by 49 US.C. § 10927. The endorsement stated, in pertinent part:

> In consideration of the premium stated in the policy to which this endorsement is attached, the insurer (the company) agrees to pay, within the limits of liability described herein, any final judgment recovered against the insured for *public liability* resulting from negligence in the operation, maintenance or use of motor vehicles subject to the financial responsibility requirements of Sections 29 and 30 of the Motor Carrier Act of 1980 *regardless of whether or not each motor vehicle is specifically described in the policy* . . . It is understood and agreed that no condition, provision, stipulation, or limitations contained in the policy, this endorsement, or any other endorsement thereon, or violation thereof, shall relieve the company from liability or from the payment of any final judgment, within the limits of liability herein described, irrespective of the financial condition, insolvency or bankruptcy of the insured. However, all terms, conditions, and limitations in the policy to which the endorsement is attached shall remain in full force and effect as binding between the insured and the company. The insured agrees to reimburse

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[3] An ICC endorsement, an MCS-90, is required to be attached to any liability policy issued to a certified interstate carrier. *See* 49 C.F.R. § 1003.3. The endorsement is designed to eliminate the possibility of denial of coverage by an insurer based upon an excess "other insurance" clause or other limiting provisions contained in the policy. *See* 49 C.F.R. 387.15 (containing the form endorsement). The ICC was abolished by Congress in 1995. *See* ICC Termination Act, 109 Stat. 803 (1995). The ICC's authority to regulate motor carriers was transferred to the Department of Transportation, See 49 U.S.C. § 13501 et seq., but the old ICC regulations remain in effect until the new regulations are promulgated.

the company for any payment made by the company on account of any accident, claim, or suit involving a breach of the terms of the policy, and for any payment that the company would not have been obligated to make under the provisions of the policy except for the agreement contained in this endorsement. (Emphasis added).[4]

DISCUSSION

Federal law applies to the operation and effect of ICC-mandated endorsements. *See Planet Ins. Co. v. Transport Indem. Co.*, 823 F.2d 285, 288 (9th Cir.1987); *see also Canal Ins. Co. v. First General Ins. Co.*, 889 F.2d 604, 610 (5th Cir.1989), modified on other grounds, 901 F.2d 45 (5th Cir.1990); *Ford Motor Co. v. Transport Indem. Co.*, 795 F.2d 538, 545 (6th Cir.1986); *In re Yale Express Sys., Inc.*, 362 F.2d 111, 114 (2d Cir.1966).

The question before us is whether the MCS-90 endorsement to Sahota's policy obligates John Deere to indemnify Garcha and Blue Star in the underlying action. The Appellants argue that the MCS-90 endorsement to Sahota's policy negates the limiting definition of "covered auto" in part (b) of the policy. By extension, they argue that part (b)'s definition of "WHO IS AN INSURED" is thus modified to include permissive users of non-covered autos. Accordingly, they contend that John Deere cannot rely on these limiting provisions of the underlying policy to avoid the indemnification duties invoked by the endorsement. John Deere disagrees and argues that it is not legally liable for judgments against parties other than its named insured and that the definition of "insured" is not altered by the MCS-90 endorsement. John

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[4] Pursuant to the MCS-90 endorsement, "motor vehicle" is defined to include trailers.

Deere maintains that while the MCS-90 may negate the "covered auto" limitation in part (a) of the "WHO IS AN INSURED" section, it does not negate the "covered auto" limitation for permissive users in part (b).

The district court relied heavily on our decision in *Harco Nat. Ins. Co., v. Bobac Trucking, Inc.,* 107 F.3d 733 (9th Cir.1997) in finding for John Deere. The court read *Harco* as creating a dichotomy between the inclusive "coverage" provided under an insurance policy and the distinct and separate "reimbursable obligation" imposed by an MCS-90. The court reasoned that because Garcha was not a named insured and because he drove a non-covered auto, John Deere owed no duty to indemnify because "the MCS-90 . . . [does] not vary the terms of the policy so as to create "coverage" where it did not formerly exist; [it imposes] only a reimbursable obligation as to final judgments rendered against the named insured."

We conclude that the district court's reliance on *Harco* was misplaced. Furthermore, we disagree with the court's reading of the MCS-90, which we conclude does provide for indemnification under the factual circumstances of this case.

In *Harco,* we considered whether an MCS-90 endorsement created a duty on the part of an insurer to defend its insured in an underlying personal injury action involving a vehicle not covered under the main policy. The insured had argued that the MCS-90 endorsement superseded the limiting language of the policy, in which a duty to defend existed only as to "covered autos." In resolving the claim in favor of Harco, we observed that "federal courts have consistently stated that the MCS-90 endorsement does not create a duty to defend claims which are not covered by the policy but only by the endorsement." *Id.,* 107 F.3d at 735-36 (internal citations omitted).

Harco is distinguishable on a number of grounds. First

and foremost, *Harco* dealt solely with a duty to defend and did not address a duty to indemnify. *See id.* at 735. These two duties are separate and distinct, a fact we recognized when we noted that "the reimbursement provision of the MCS- 90 is inconsistent with implying a duty to defend." *Id.* at 736. The most notable distinction between the two duties is that while the MCS-90 *explicitly* imposes a duty to indemnify an insured for liability related to non-covered autos, it is silent about a duty to defend an insured for non-covered autos. Insofar as *Harco* held that the MCS-90 does not implicitly create a duty to defend, this holding is irrelevant when considering a duty to indemnify because, as noted, the MCS-90's sole purpose is to create such a duty.

Furthermore, under the MCS-90 endorsement, as between the insured and insurer, all limitations, endorsements and other terms and conditions of the policy remain in effect. *See id.* at 736. Since the *Harco* policy, on its own terms, did not contain a duty to defend for non-covered autos, and those policy terms remained in effect as between the insured and insurer, the MCS-90 did not extend "coverage" to create such a duty. *See id.* The instant case differs in the crucial respect that the MCS-90 *explicitly* provides that John Deere must indemnify its insured for non-covered autos, thus expressly negating the covered auto limitation in the main policy.

Finally, the dispute in *Harco* was between an insurer and its insured and as we recognized, "[t]he purpose of the MCS-90 is to protect the public, not to create a windfall to the insured." *Id.* (internal citation omitted). It is well-established that the primary purpose of the MCS-90 is to assure that injured members of the public are able to obtain judgment from negligent authorized interstate carriers. *See id.* at 736 (citing *Canal* 889 F.2d at 611) (other citations omitted); *see also Adams v. Royal Indem. Co.*, 99 F.3d 964, 968 (10th Cir.1996) ("By requiring all such described insur-

ance policies to contain this ICC endorsement, the ICC prevents the possibility that, through inadvertence or otherwise, some vehicles may be left off a policy to the detriment of the public.") (internal citation omitted); *Empire Fire and Marine Ins. Co., v. Guaranty National Ins. Co.,* 868 F.2d 357, 362-63 (10th Cir.1989) ("[T]he ICC endorsement that is the subject of this appeal had its origin in the ICC's desire that the public be adequately protected when a licensed carrier uses a leased vehicle to transport goods pursuant to an ICC certificate.") (internal citations omitted).[5]

The Appellants in the instant case are injured members of the public, and thus are precisely the group meant to be protected by the MCS-90. Consequently, the policy considerations inherent in this dispute did not play a role in *Harco* and the case's applicability is even further limited. *See Harco,* 107 F.3d at 736 (finding that plaintiff's proffered distinction between disputes between insurers, and disputes between an insurer and an insured, was meaningless because "[t]he public protection purpose has been served here[.]")

In sum, though the district court and John Deere place enormous emphasis on *Harco*'s statement regarding the limitation of "coverage" to specifically described vehicles, we conclude that *Harco*'s reasoning and analysis provide no guidance to our resolution of the instant case. Similarly John Deere's reliance on *John Deere Ins. Co. v. Truckin' USA,* 122 F.3d 270 (5th Cir.1997), is misplaced. That case involved the death of Mr. and Mrs. Kurocik as a result of an accident with a tractor/trailer rig owned by Truckin' USA. *See id.* at 271. Their heirs sued multiple defendants, including Copp Trucking Inc., whose name appeared on the tractor

[5] We note that there is no functional difference between a leased vehicle or a borrowed vehicle when the focus of the inquiry is the duty owed to an injured member of the public. Attempts to circumscribe liability by the use of leased *or* borrowed vehicles was the impetus behind the ICC's mandating the MCS-90 endorsement. *See Empire,* 868 F.2d at 361.

rig. *See id.* at 271-72. Transport Insurance Co. insured Copp trucking. Transport settled the Kurocik heirs' claims against Copp. Truckin' USA carried an insurance policy with John Deere Insurance. Transport sought reimbursement from John Deere for the settlement amount it paid on behalf of Copp since the tractor trailer was owned by Truckin' USA, John Deere's insured. *See id.*

The Fifth Circuit held that because the policy did not name Copp Trucking as an insured, the MCS-90 provided no basis for relief. *See id.* at 275. The court stated that "where an insurance policy does not provide coverage for non-listed vehicles except to third-party members of the public through operation of the endorsement, the policy provides no coverage for purposes of disputes among insurers over ultimate liability." *Id.* This is an unremarkable assertion given that the integral purpose of the MCS-90, to protect third party members of the public, is not implicated in a dispute between two insurers. *See Carolina Cas. Ins. Co. v. Underwriters Ins. Co.*, 569 F.2d 304, 313 (5th Cir.1978) ("ICC Policy factors are frequently determinative where protection of a member of the public ... is at stake, but those factors cannot be invoked by another insurance company which has contracted to insure a specific risk and which needs no equivalent protection."). We again note that the Appellants in this case are injured members of the public seeking redress. Therefore, John Deere's reliance on *Truckin' USA* is misplaced.

As we noted at the outset, this Circuit has not previously considered the precise question presented in this appeal. However, the Tenth Circuit, on nearly identical facts, concluded that an MCS-90 endorsement requires an insurer to indemnify a permissive user of a non-covered auto. *See Adams*, 99 F.3d at 968.

In *Adams*, Royal Indemnity Company ("Royal") issued two pertinent insurance policies. First, Royal issued a policy

to Thomas, a member of the partnership that owned a vehicle known as Trailer 701. The partnership had leased the trailer to Geigley. Second, Royal issued a policy to Geigley. Both policies included the MCS-90 endorsement. Trailer 701 was not a covered vehicle under either policy. Geigley lent Trailer 701 to Hofer. While driving a tractor/trailer unit which included Trailer 701, Hofer negligently caused an accident that severely injured Adams. *See id.* at 964-65. Adams sued Hofer in state court and obtained a default judgment of approximately $1 million. Adams was unable to obtain the judgment from Hofer and thus brought an action against Royal claiming that it had a duty to indemnify Hofer by virtue of the MCS-90 endorsements on Geigley and Thomas's policies. *See id.* at 965-66.

Adams held that the MCS-90 endorsement had the effect of expanding coverage to Hofer under Geigley's policy. *See id.* at 971. The court noted that the endorsement indirectly modified Royal's policy definition of "insured" which limited coverage to a person using a "covered auto". *See id.* Because of this modification, the court concluded that Hofer constituted an "insured" under Geigley's policy. *See id.* Significantly, *Adams* concluded that the definition of insured as modified by the endorsement would effectively read "Anyone else is an insured while using with your permission an auto you own, hire, or borrow . . ." *Adams*, 99 F.3d at 971. Accordingly, Royal was obligated to indemnify Hofer for the judgment to Adams.[6] *See id.* at 972. We agree with

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[6] John Deere attempts to distinguish *Adams* based on the court's second conclusion that Thomas's policy did *not* apply to the trailer because, at the time of the accident, Thomas neither owned nor had control over the trailer since it was owned by the partnership and not by Thomas individually. *See id.* at 971. This argument is unavailing however, because in the instant case it is undisputed that Sahota owned the Great Dane trailer.

the reasoning expressed in *Adams*.

The critical language in the endorsement is the provision which states that "the insurer agrees to pay . . . any final judgment recovered against the insured for public liability . . . *regardless of whether or not each motor vehicle is specifically described in the policy* [.]" (emphasis added). This language indicates that whatever limitation a policy expresses regarding coverage extending only to "covered" or "specified" autos, this limitation ceases to operate when an injured member of the public seeks indemnification on behalf of the "insured". *See Empire,* 868 F.2d at 362 (The MCS-90 "negates any inconsistent limiting provisions in the insurance policy to which it is attached[.]"). Furthermore, a policy containing the MCS-90 "cannot explicitly limit liability to those vehicles specifically described therein, nor can it indirectly so limit coverage by attempting to define who is an insured in terms of specifically described vehicles." *Adams,* 99 F.3d at 970; *See also Canal* 889 F.2d at 610 (recognizing that the MCS-90 reads excess and other- insurance clauses out of the policy as against injured members of the public.)

John Deere asks us to read the use of the word "insured" in the endorsement as referring only to its named "insured", Sahota. In other words, John Deere maintains that the MCS-90 only negates the "covered auto" limitation with regard to the named insured, and would not impact its obligations regarding permissive users. However, we decline to limit the endorsement in this manner. Under John Deere's proffered interpretation, the MCS-90 negates the express provision in part (a) of the "WHO IS AN INSURED" section of the policy which limits coverage to only "covered autos." This is so because without the endorsement, Sahota would not be an "insured" under the policy if he caused injury while driving a non-covered auto. It is the endorsement that would transform him into an "insured". Thus, it is inescap-

able that the effect of the MCS-90 endorsement is to modify the policy's definition of an "insured." Yet John Deere nonetheless argues that the same provision of the endorsement is meaningless when applied to a different part of the same section of the policy.

We can see no rational basis for distinguishing between the endorsement's effect on the part (a) definition of "insured" and its effect on the part (b) definition. Had Garcha and Blue Star been driving a covered auto under the policy, they would have been covered as "insureds" under the policy per the express definition in part (b). We conclude that the MCS-90 operates in exactly the same manner when applied to the definition of "insured" in part (b) as it does when applied to part (a). In both cases, the MCS-90 negates the limitation that only users of "covered autos" are "insureds". Therefore, we conclude that under the policy before us, John Deere cannot avoid indemnifying Garcha and Blue Star by relying on the policy's narrow definition of "insured" which attempts to limit that status to permissive users of solely "covered autos". *See Adams,* 99 F.3d at 970.

We note that our interpretation of the endorsement effectuates its intended purpose of assuring that the insurer is available as a financially responsible party on behalf of the authorized carrier, so that injured members of the public are able to collect judgments obtained against these carriers. *See Adams* 99 F.3d at 968-69. Garcha and Blue Star were authorized carriers using Sahota's trailer with permission, and Nueva and LACMTA are injured members of the public. Under these circumstances, the MCS-90 serves the purpose it was expressly designed to serve, modifying a policy to insure the availability of insurance for negligently injured members of the public. Interpreting the endorsement in the way advocated by John Deere would frustrate this express Congressional goal.

In conclusion, it is undisputed that Garcha and Blue Star

were using the Great Dane trailer with Sahota's permission at the time of the accident and that the trailer was, at that time, a regulated vehicle that Sahota owned. Therefore, Garcha and Blue Star are "insureds" under the MCS-90 modification to the Sahota policy and John Deere is liable to the Appellants for any judgment against Garcha and Blue Star up to the policy maximum.

CALIFORNIA PERMISSIVE USER STATUTE

The district court also ruled against the Appellants on their claim that Garcha and Blue Star should be afforded coverage under California Insurance Code § 11580.1. Given that we have decided in the Appellants' favor under federal law, we decline to reach their state statutory claim.

CONCLUSION

For the reasons stated, we REVERSE the district court's ruling that John Deere is not liable to LACMTA and Nueva under the Sahota policy as modified by the MCS-90 endorsement, and we REMAND for further proceedings on that claim.

REVERSED and REMANDED.

APPENDIX B

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
CV 98-0036 LGB (JGx)

JOHN DEERE INSURANCE COMPANY,
Plaintiff,
v.
GUILLERMO NUEVA, LOS ANGELES COUNTY METROPOLITAN TRANSPORTATION AUTHORITY, *et al.*,
Defendants.

ORDER GRANTING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT, DENYING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT, AND DISMISSING SAHOTA AND SAHOTA TRUCKING FOR LACK OF PROSECUTION

I. INTRODUCTION

Cross-motions for summary judgment filed by plaintiff John Deere Insurance Company ("Deere") and defendants L.A. County Metropolitan Transportation Authority ("MTA") and Guillermo Nueva ("Nueva") came on regularly for hearing on July 6, 1998. Having carefully considered the papers filed and oral argument of counsel, the Court hereby GRANTS plaintiff John Deere Insurance Company's motion for summary judgment and DENIES defendants L.A. County Metropolitan Transportation Authority's motion for sum-

mary judgment.

This case arises from a multi-vehicle collision involving automobiles, a tractor-semi-trailer, and an MTA bus, that took place on November 24, 1995.[7] The cross-motions currently before the Court address the same two issues: whether a trailer, owned by John Deere's insured, and involved in the collision, is a covered auto under the John Deere policy, alone or as amended by the MSC-90 and PUC endorsements; and whether John Deere must provide coverage to permissive users of that trailer.

On January 5, 1998, plaintiff Deere filed its original Complaint, seeking declaratory judgment respecting its duty to defend or indemnify any of a large number of defendants involved in the collision. In the collision, a car operated by defendant Dedric Mangum ("Mangum") collided with a car operated by defendant Joo Sang Lee ("Lee"). A tractor-semi-trailer and an MTA bus were also involved. Deere filed the currently-operative First Amended Complaint ("1AC") on February 6, 1998, seeking declaratory relief against defendants Guillermo Nueva (an MTA bus operator); Gurmukh Singh Garcha (alleged operator of a tractor-semi-trailer combination); Southwestern Carriers (Garcha's employer); Lee; Mangum; Baljit Sahota (Deere's insured, who had alleged sold the tractor-semi-trailer); Sahota Trucking (Sahota's dba); Blue Star Trucking aka Blue Star Transportation (who had allegedly bought the tractor-semi-trailer); Los Angeles County Metropolitan Transportation Authority ("MTA"); Progressive Northwestern Insurance Company; and individuals Inderjit Singh, Rashpal Singh, and Tarsem Singh. On March 20, 1998, defendant MTA filed a counterclaim against Deere and a cross-claim against all the other

[7] The Complaint and 1AC allege that the accident occurred December 24, 1995. (1AC ¶ 19.) However, in the Stipulated Statement filed in support of these cross-motions, the date is November 24, 1995. (Stipulated Fact 3.)

defendants except Nueva, driver of the MTA bus. By its counterclaim and cross-claim, MTA seeks declaratory judgment regarding who is an insured under the policy, and regarding Deere's duty to defend and indemnify any such insured.

On March 19, 1998, this Court issued plaintiff Deere an Order to Show Cause on or before April 9, 1998 why this action should not be dismissed for lack of prosecution as to defendants Garmukh Singh Garcha, Joo Sang Lee, Blue Star Trucking, Dedric Mangum, Inderjit Singh, and Rashpal Singh. No Response was filed, and by Order entered April 17, 1998, these defendants were dismissed from the action. On April 30, 1998, Deere filed an *Ex Parte* Application to vacate the dismissal of these defendants, which was granted by Order entered May 11, 1998. On June 5, 1998, plaintiff filed a proof of service as to each of these defendants.

On April 16, 1998, this court issued Plaintiff Deere an Order to Show Cause on or before May 8, 1998 why the action should not be dismissed for lack of prosecution as to Sahota Trucking, Baljit Sahota, Progressive Northwestern Insurance Company, Tarsem Singh, and Southwestern Carriers.

On April 29, 1998, plaintiff filed a voluntary dismissal of defendant Southwestern Carriers, Progressive Northwestern Insurance Company, and Tarsem Singh. By Minute Order May 12, 1998, this Court granted plaintiff's request for an extension of time to serve defendants Baljit Sahota and Sahota Trucking, until June 8, 1998. As of July 1, 1998, Deere has filed no proof of service as to Sahota and Sahota Trucking, and these defendants and therefore DISMISSED WITHOUT PREJUDICE for lack of prosecution.

On May 29, 1998, defendant MTA filed its motion for summary judgment. On June 4, 1998, Deere filed its Opposition, which contains its own motion for summary

judgment. MTA's Opposition to Deere's motion and Reply in support of its own motion was filed June 15, 1998. Deere's Reply in support of its own motion was filed June 17, 1998.

II. FACTUAL BACKGROUND

The following facts are relevant and undisputed:

A. Accident Facts

On or about November 24, 1995, a vehicular accident occurred on the freeway when a 1992 Chevrolet Cavalier, owned by nonparties Gelco Corporation U.S.A. and Burns International, and operated by defendant Mangum, collided with a white 4-door 1990 Nissan automobile driven by defendant Lee. (Stip. Fact 3.) Following this collision, an MTA bus operated by defendant and MTA employee Nueva was stopped on the freeway, with its flashers blinking, to avoid the collision. (Stip. Fact 4.) Nueva was acting in the course and scope of his employment with the MTA at the time. (Stip. Fact 4.) While stopped, the MTA bus was rear-ended by a tractor/trailer unit. (Stip. Fact 4.)

The tractor/trailer unit that rear-ended Nueva and the MTA consisted of a 1995 Peterbilt tractor, California license SP4146 ("the Peterbilt tractor"), pulling a 1987 Great Dane Trailer, California license FT45828, VIN # 1GRAA9621HS054301 ("the Great Dane Trailer.") (Stip. Fact 5.)

The driver/operator of the truck/trailer unit at the time of the accident was defendant Garcha. (Stip. Fact 6.) The owners of the Peterbilt tractor at the time of the accident were Garcha, dba defendant Blue Star Trucking ("Blue Star"), and defendant Inderjit Singh ("I. Singh"). (Stip. Fact 7.) The registered owner of the Great Dane trailer at the time of the accident was defendant Sahota Trucking. (Stip. Fact 8.)

Prior to the accident, I. Singh and Garcha of Blue Star had entered into a purchase agreement with Sahota Trucking for the purchase of the Great Dane trailer, but the final payment had not been made and legal title had not passed to Blue Star at the time of the accident. (Stip. Fact 9.)

As a result of the accident, Nueva was injured and MTA paid workers' compensation benefits to or on behalf of Nueva, in the amount of $39,233,74 as of April 27, 1998, and continuing. (Stip. Fact 10.) The accident also resulted in $101,953.65 damage to the bus. (Stip. Fact 11.)

On November 13, 1996, Nueva filed a personal injury lawsuit relating to this accident in Los Angeles superior Court against Garcha, Southwestern Carriers, Joo Lee, Sahota Trucking, Baljit Sahota, Servs, Inc., and Blue Star Trucking. *G. Nueva v. Garcha, et. al.*, TC 009 762. (Stip. Facts 12 and 13; Exh. B.) The MTA filed a complaint in intervention on December 18, 1996 against all the same defendants, seeking reimbursement of the property damages to the bus and the workers' compensation paid to Nueva. (Stip. Fact 15; Exh. C.) The MTA has filed defaults against Blue Star Trucking, Joo Lee, I. Singh, and Garcha in the Superior Court case. (Stip. Fact 14.)

B. Policy-Related Facts

1. The John Deere Policy

On or about August 21, 1995, Deere issued its insurance policy No. 734326-7695-954 to Baljit Sahota dba Sahota Trucking ("the policy"). (Stip. Fact 1; Exh. A.) The policy was in force on the date of this accident. (Stip. Fact 2.)

The Great Dane Trailer was not a scheduled vehicle under the John Deere policy. (Stip. Fact 16.) No vehicle or any portion of any vehicle involved in this accident was a scheduled vehicle under the John Deere policy. (Stip. Fact

17.)

Under the Policy, "Auto" is defined in pertinent part as "a land motor vehicle, trailer or semi-trailer." (Deere's Statement Exh. a, p. 43.) Sahota's policy Truckers Coverage Form Declarations indicates "46" under "Covered Autos." The code "46" is defined as follows:

> 46 = specifically Described "Autos." Only those "autos" described in Items Three of the Declarations for which a premium charge is shown (and for Liability Coverage any "trailers" you don't own while attached to any power unit described in Item Three).

(Stip. Fact 27.) The policy further states, "The symbols entered next to a coverage on the Declarations designate the only 'autos' that are covered 'autos.'" (Stip. Fact 27.)

The Trucker's Coverage Form CA 00 12 06 92, part of the policy issued to Sahota, provides, in pertinent part, as follows:

> 1. Who Is An Insured
>
> The following are "insureds":
>
> a. You for any covered "auto."
>
> b. Anyone else while using with your permission a covered "auto" you own, hire or borrow.
>
> c. The owner or anyone else from whom you hire or borrow a covered "auto" that is a "trailer" while the "trailer" is connected to another covered "auto" that is a power unit, or, if not connected:
>
> (1) Is being used exclusively in your business as a "trucker"; and

> (2) Is being used pursuant to operating rights granted to you by a public authority.

(Stip. Fact 26.)

2. PUC Endorsement and Form MCS-90

Pursuant to Form F of the Uniform Motor Carrier Bodily Injury and Property Damage Liability Insurance Endorsement ("Form F") (Stip. Fact 18; Exh. D), the California Public Utilities Commission ("PUC") issued to Baljit Singh Sahota dba Sahota Trucking a Certificate of Insurance certifying that Deere issued the John Deere policy to Sahota ("Certificate"). (Stip. Fact 19, 20, Exh. E.)

The applicable PUC endorsement provides in pertinent part as follows:

> The policy to which this endorsement is attached . . . is hereby amended . . .
>
> In consideration of the premium stated in the policy to which this endorsement is attached, the Company hereby agrees to pay, within the limits of liability hereinafter provided, any final judgment rendered against the insured for bodily injury to or death of any person, or loss of or damage to property of others... resulting from the operation, maintenance, or use of motor vehicles and/or trailers for which a certificate of public convenience and necessity or permit is required or has been issued to the insured by the Public Utilities Commission of the State of California, regardless of whether such motor vehicles and/or trailers are specifically described in the policy or not....
>
> Within the limits of liability hereinafter provided it is further understood and agreed that

> no condition, provision, stipulation, or limitation contained in the policy, or any other endorsement thereon or violation thereof, or of this endorsement, by the insured, shall relieve the Company from any liability hereunder or from the payment of any such final judgment, irrespective of the financial responsibility or lack thereof or insolvency or bankruptcy of the insured. However, all terms, conditions, and limitations in the policy to which this endorsement is attached are to remain in full force and effect as binding between the insured and the Company, and the insured agrees to reimburse the Company for any payment made by the Company on account of any accident, claim, or suit involving a breach of the terms of the policy, and for any payment that the Company would not have been obligated to make under the provisions of the policy except for the agreement contained in this endorsement.

(Stip. Facts 21-22; Exh. F.)

The Policy was also amended by Form MCS-90, Endorsement for Motor Carrier Policies of Insurance for Public Liability under Sections 29 and 30 of the Motor Carrier Act of 1980 ("Form MCS-90"). (Stip. Fact 23; Exh. G.) the Form MCS-90 provides that the John Deere Policy is primary, with a limit of $750,000 for each accident. (Stip. Fact 24.) The Form MCS-90 also provides, in pertinent part, as follows:

> In consideration of the premium stated in the policy to which this endorsement is attached, the insurer (the company) agrees to pay, within the limits of liability described

> herein, any final judgment recovered against the insured for public liability resulting from negligence in the operations, maintenance, or use of motor vehicles subject to the financial responsibility requirements of Sections 29 and 30 of the Motor Carrier Act of 1980 regardless of whether or not each motor vehicle is specifically described in the policy.... The insured agrees to reimburse the company for any payment made by the company on account of any accident, claims, or suit involving a breach of the terms of the policy, and for any payment that the company would not have been obligated to made under the provisions of the policy except for the agreement contained in this endorsement.
>
> It is further understood and agreed that, upon failure of the company to pay any final judgment recovered against the insured as provided herein, the judgment creditor may maintain an action in any court of competent jurisdiction against the company to compel such payment.

(Stip. Fact. 25; Exh. G.)

III. ANALYSIS

A. Applicable Legal Standards

1. Summary Judgment

a. Generally

Summary judgment shall be granted if the evidence supporting the motion for summary judgment shows that

"there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). A party moving for summary judgment may carry its initial burden by pointing out to the district court that there is an absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). "The plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex*, 477 U.S. at 322. If the non-moving party bears the burden of proof at trial, the moving party may carry its burden by showing an absence of evidence to support the non-moving party's case. *Celotex*, 477 U.S. at 323.

To avoid summary judgment, the non-movant must set forth specific facts showing that there remains a genuine issue of material fact for trial. *Celotex*, 477 U.S. at 324. The non-movant "may not rest upon the mere allegations or denials of the adverse party's pleading." A factual dispute is "genuine" if a reasonable jury could return a verdict for the non-moving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). The evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in the non-movant's favor. *Id.* at 255. If the nonmoving party's evidence is merely colorable or is not significantly probative, then summary judgment may be granted. *Id.* at 249-50.

b. Summary Judgment in the Insurance Context

Interpretation of insurance policies is a matter of law. *Stanford Ranch, Inc. v. Maryland Cas. Co.*, 89 F.3d 618, 624 (9th Cir. 1996). Interpretation of statutes is also a question of law. *Forest Conservation Council v. Rosboro Lumber*

Co., 50 F.3d 781, 783 (9th Cir. 1995).

Summary judgment is often appropriate on issues involving interpretation of the insurance policy. So long as the terms of the policy are clear and unambiguous, interpretation of the policy presents an issue of law that may be resolved by summary judgment. *State Farm & Cas Co. v. Eddy*, 218 Cal.App.3d 958, 965 (1990).

Summary judgment may also be appropriate to determine whether an insurer has a duty to defend the insured. *Horace Mann Ins. Co. v. Barbara B.*, 4 Cal.4th 1076, 1080-81 (1993).

2. Applicable Insurance Law

Cal. Ins. Code §11580.1(b)(4) states, in pertinent part,

> (b) Every policy of automobile liability insurance . . . shall contain all of the following provisions:
>
> . . . .
>
> (4) Provision affording insurance to the named insured with respect to any owned or leased motor vehicle covered by such policy, and to the same extent that insurance is afforded to the named insured, to any other person using such motor vehicle, provided the use is by the named insured or with his or her permission. . . . As used in this chapter, "owned motor vehicle" includes all motor vehicles described, and rated in the polity.

In *Harco Nat. Ins. Co. v. Bobac Trucking Inc.*, 107 F.3d 733, 735-36 (9th Cir. 1997), the Ninth Circuit explicitly addressed the issue of whether an MCS-90 creates a "duty to defend" when the insurance policy at issue covered only spe-

cifically described autos, and the vehicle involved in the accident was not so described. It does not.

> [F]ederal courts have consistently stated that the MCS-90 endorsement does not create a duty to defend claims which are not covered by the policy but only by the endorsement. . . . [T]he MCS-90 does not expand coverage to autos not covered under the main policy. . . . [T]he reimbursement provision of the MCS-90 is inconsistent with implying a duty to defend.

Harco, 107 F.3d at 736. The Ninth Circuit therefore distinguished the inclusive "coverage" provided under an insurance policy from that expansion of liability imposed by the MCS-90, namely, a reimbursable obligation to pay any final judgment entered against a named insured. The Ninth Circuit explicitly distinguished an insurer's "duties under the main policy" from an "insurer's duty to pay [a final judgment] even if its insured is unable to respond to the insurer's claim for reimbursement." *Id.* Only the former includes such obligations as a duty to defend and indemnify. *Id.*

B. Discussion

In this discussion, the court will employ the distinction drawn by the Ninth Circuit, in *Harco*, supra, between an insurer's "duties under the main policy," referred to hereinafter as "coverage," and an insurer's reimbursable obligation to pay any final judgment against its named insured, referred to hereinafter as "the reimbursable obligation."

In its motion, the MTA seeks "a declaration that John Deere [Ins. Co.] has the potential duty under the John Deere policy to indemnify Garcha and Blue Star, entities which are otherwise uninsured, against the underlying action [*Nueva v. Garcha, et al.*] up to a limit of liability of $750,000, as well

as its named insured, Sahota." [MTA Mot. 2:11-14.] That is, the MTA seeks a declaration that Deere must provide "coverage" in the full sense to Garcha and Blue Star. John Deere seeks a declaration that it has no obligation whatsoever to Blue Star and Garcha, of either the full "coverage" or the narrow "reimbursable obligation" variety.

The Court's analysis will proceed in two steps. First, the Court will determine whether the John Deere policy, either standing alone or as amended by the PUC endorsement and the MCS-90, provides "coverage" for the Great Dane trailer, an unscheduled vehicle. Second, the Court will determine whether the John Deere policy, either standing alone or as amended by the PUC endorsement and the MCS-90, provides either "coverage" or a "reimbursable obligation" to Blue Star and Garcha, as "permissive users" of the Great Dane trailer.[8]

1. Does the John Deere Policy, Alone or As Amended, Provide "Coverage" For The Great Dane Trailer?

It is not disputed that the Great Dane trailer was not a scheduled vehicle on the policy. (Stip. Fact 16.)[9] Nor is it disputed that the policy itself provides coverage only to scheduled vehicles. (Stip. Fact 27.) On this basis, the Great Dane trailer, a nonscheduled vehicle, is not a covered auto

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[8] Although it is not relevant to the Court's determination of these motions, the instant federal declaratory relief action was filed in the context of the pending Superior Court action *Nueva v. Garcha*, in which the MTA has filed defaults against Blue Star, Lee, I. Singh, and Garcha. After proving the amounts for which each defaulting party is liable, the MTA and Nueva will be entitled to proceed against any available insurance. The MTA contends that the Deere policy is available.

[9] Although the policy refers to "covered autos," it is not disputed that a trailer may be a covered vehicle under the policy definitions. (Deere Statement, Exh. a, p. 43.)

under the policy itself.

Nevertheless, the MTA argues that "the trailer was a covered vehicle under the John Deere policy by virtue of the MCS-90 and PUC endorsements, regardless of the fact that it was not a vehicle scheduled in the policy." (MTA Mot. 2:6-8.)

However, under *Harco*, "[T]he MCS-90 does not expand coverage to autos not covered under the main policy." *Harco*, 107 F.3d at 736. The parties have not cited any case specifically construing the PUC endorsement. However, the relevant language of the PUC endorsement is identical to that of the MCS-90. Like the MCS-90, the PUC endorsement states, "all terms, conditions, and limitations in the policy to which this endorsement is attached are to remain in full force and effect." (Stip. Facts 21-22; Exh. F.) On that basis, the rationale of Harco applies to the PUC endorsement also.

Therefore, while the MCS-90 and PUC endorsement impose a "reimbursable obligation" on the insurer (under certain circumstances), they do not expand "coverage" beyond that provided in the policy itself. By imposing a reimbursable obligation on Deere, the MCS-90 and the PUC endorsement require Deere to pay any final judgment against its named insured, Sahota, subject to reimbursement by Sahota.[10] The MCS-90 and PUC endorsement, by their own terms, do not and cannot render the trailer a "covered vehicle," or create "coverage" for the Great Dane trailer.

Interpretation of the policy presents an issue of law that may be resolved by summary judgment, under *State Farm*, 218 Cal.App.3d at 965. The Court therefore finds that the Great Dane trailer was not a "covered vehicle" under the John Deere policy, and no "coverage" is available under the

[10] Thus it is irrelevant, as well as undisputed, that the Great Dane trailer is the type of vehicle which requires an MSC-90 and PUC endorsement, as the MTA argues at length. (MTA Mot. 14:18-16:19.)

policy.

The MTA argues, citing *Smith v. Travelers Indemnity Co.*, 32 Cal.App.3d 1010, 1016 (1973), that because Sahota's liability, if any, "arose out of" the use of the Great Dane trailer by permissive users Garcha and Blue Star, the Great Dane trailer is a covered vehicle. The MTA's argument is unavailing. In *Smith*, there was no dispute over whether the insurance policy covered the trailer. In this case, the terms of the policy clearly and unambiguously do not cover the trailer.

2. Does the John Deere Policy, Alone or As Amended, Provide "Coverage" or a "Reimbursable Obligation" to Blue Star and Garcha, as "Permissive Users" of the Great Dane Trailer?

It is undisputed that at the time of the accident, Garcha and Blue Star were "permissive users" of the trailer.[11]

The MTA argues, on this basis, that Garcha and Blue Star are additional insureds under the policy, and receive coverage equal to that of the named insured, Sahota, pursuant to Cal. Ins. Code §11580.1. The MTA seeks "a declaration that John Deere [Ins. Co.] has the potential duty under the John Deere policy to indemnify Garcha and Blue Star, entities which are otherwise uninsured, against the underlying action [*Nueva v. Garcha, et al.*] up to a limit of liability of $750, 000, as well as its named insured, Sahota." (MTA Mot. 2:11-14.) This form of insurer liability has been referred to herein as "coverage."

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[11] A significant portion of MTA's motion is devoted to establishing this fact, which is apparently not disputed by Deere. (MTA Mot. 9:1-12:16.) Although this is not one of the Facts included in the "Stipulated" Statement, Deere's Opposition to MTA's motion states, "It is undisputed that under California law Garcha and Blue Star were "permissive users" of the trailer." (Opp. 7:5-6.).

Deere argues that it owes neither coverage nor a reimbursable obligation to Garcha and Blue Star, because the Great Dane trailer was not covered by the policy, and because the MCS-90 and PUC endorsement obligate Deere to pay any final judgment for damages against Sahota only.[12] That is, Deere argues that the policy itself provides coverage to permissive users of covered autos only, while the MCS-90 and PUC endorsement create a reimbursable obligation only to Sahota, the named insured.

Under the heading, "Who Is An Insured," the Deere policy lists, inter alia, "Anyone else while using with your permission a covered "auto" you own, hire or borrow." (Stip. Fact 26.) This policy makes clear that permissive users of noncovered autos are not insureds under the policy. In this respect, the Deere policy is distinguishable from policies in cases cited by the MIA, which provided coverage for permissive users of any vehicle owned by the insured. See, e.g., *California State Automobile Assn. V. Foster*, 14 Cal.App.4th 147, 151-152; *Uber v. Ohio Casualty Ins. Co.*, 247 Cal.App.2d 611, 613 (1967) ("Each policy contained an omnibus clause insuring any person using an automobile owned by the named insured with the latter's permission"); *Somerville v. Providence Washington Indemnity Co.*, 218 Cal.App.2d 237, 242 (1963) (policy covers "any automobile owned by or in charge of the named insured"). On this basis, under the Deere policy, permissive users of covered autos are additional insureds, but permissive users of noncovered autos are not. Garcha and Blue Star are therefore not "addi-

---

[12] "There is no dispute that the MCS-90 endorsement requires John Deere to pay final judgments rendered against Sahota regardless of whether the vehicle involved in the accident is scheduled on the policy or not." (Deere's Opp. 3:21-24; Deere's Opp. 6:7-14.) Although Deere's obligation to pay is primary, Deere also contends, correctly, that under the MCS-90 Sahota will have an obligation to reimburse Deere. (Deere's Opp. 6:15-18.)

tional insureds" under the policy.

The MCS-90 and PUC endorsement do not vary the terms of the policy so as to create "coverage" where it did not formerly exist; they impose only a reimbursable obligation as to final judgments rendered against the named insured. *Harco*, 107 F.3d at 736. The MCS-90 and PUC endorsement therefore do not render Garcha and Blue Star additional insureds under the policy.

Nor does Cal. Ins. Code §11580.1(b)(4) have this effect. It is not disputed that the Deere policy provided insurance coverage to the named insured with respect only to scheduled vehicles. Thus, the requirement that the Deere policy provide coverage to permissive users "to the same extent" as it is provided to the named insured means, under Cal. Ins. Code §11580.1(b)(4), that permissive users of covered autos are covered to the same extent as the named insured. The. MTA offers no statutory or caselaw support for its characterization of Cal. Ins. Code §11580.l's "omnibus" clause as providing coverage for permissive users more inclusive than that provided to named insureds, and this court is aware of none. The policy by its own terms therefore provides permissive users, like named insureds, insurance coverage for covered autos only. The MCS-90 and PUC endorsement provide not "coverage," but payment of a final judgment, subject to reimbursement. The MCS-90 and PUC endorsement are not an insurance policy, and the MTA's attempt to apply Cal. Ins. Code §11580.1(b)(4) to an MCS-90 and PUC endorsement is therefore without legal support.

Therefore, even if the MTA is correct in characterizing Deere as having a "duty to defend and indemnify" any permissive user of a covered vehicle (see, e.g. MTA Mot. 1:4; MTA Counterclaim 10:6, 10:12), Garcha and Blue Star are not such entities. Rather, Garcha and Blue Star are permissive users of a noncovered vehicle. As the policy terms are "clear and unambiguous," summary judgment is appro-

priate under *State Farm*, supra. The Court therefore finds that the John Deere policy does not provide coverage to Garcha and Blue Star, as permissive users of a noncovered auto. John Deere Insurance Company has no duty to defend or indemnify Garcha and Blue Star under the policy issued by John Deere to Sahota, either alone or as amended by the PUC endorsement and the MCS-90. Nor does John Deere Insurance Company have a reimbursable obligation to pay any final judgment entered against Garcha and Blue Star. That reimbursable obligation is to its named inured alone.

IV. CONCLUSION

On the basis of the foregoing, summary judgment is GRANTED in favor of John Deere Insurance that John Deere Insurance Company owes no duty to defend or indemnify Garcha and Blue Star in the underlying action, nor to pay any final judgment entered against them subject to a right of reimbursement. The MTA's motion for summary judgment is therefore DENIED. Defendants Sahota and Sahota Trucking are DISMISSED for lack of prosecution.

IT IS SO ORDERED.

Dated: _____

_____
LOURDES G. BAIRD
United States District Judge

APPENDIX C

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 98-56464

D.C. No. CV-98-00036-LGB

JOHN DEERE INSURANCE COMPANY,

an Illinois corporation,

Plaintiff-cross-defendant-Appellee,

v.

GUILLERMO NUEVA,

Defendant-Appellant,

LOS ANGELES COUNTY METROPOLITAN TRANSPORTATION AUTHORITY,

Defendant-cross-claimant-Appellant,

and

JOO SANG LEE, DEDRIC MANGUM, RASHPAL SINGH, GURMUKH SINGH GARCHA, BLUE STAR TRUCKING, aka Blue Star Transportation, INDERJIT SINGH, SOUTHWESTERN CARRIERS, BALJIT SAHOTA, PROGRESSIVE NORTHWESTERN INSURANCE COMPANY, TARSEM SINGH,

Defendants-Cross-defendants.

ORDER

FILED December 26, 2000

Cathy A. Catterson, Clerk

U.S. Court of Appeals

Before: HUG and FERGUSON, Circuit Judges, and RESTANI,[13] Court of International Trade Judge.

Judge Hug voted to deny appellee's petition for rehearing en banc. Judge Ferguson and Judge Restani have voted to recommend denying the petition for rehearing en banc.

The full court has been advised of the petition for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35(b).

The petition for rehearing en banc is DENIED.

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[13] The Honorable Jane A. Restani, Judge of the Court of International Trade, sitting by designation.

APPENDIX D

STATUTORY PROVISIONS INVOLVED

Pertinent provisions of the ICC Termination Act of 1995 are codified at 49 U.S.C. §§ 13901 *et seq*. as follows:

§ 13901. Requirement for registration

A person may provide transportation or service subject to jurisdiction under subchapter I or III of chapter 135 or be a broker for transportation subject to jurisdiction under subchapter I of that chapter, only if the person is registered under this chapter to provide the transportation or service.

§ 13902. Registration of Motor Carriers

(a) Motor Carrier Generally. –

(1) In general. -- Except as provided in this section, the Secretary shall register a person to provide transportation subject to jurisdiction under subchapter I of chapter 135 of this title as a motor carrier if the Secretary finds that the person is willing and able to comply with –

(A) this part and the applicable regulations of the Secretary and the Board;

(B) any safety regulations imposed by the Secretary and the safety fitness requirements established by the Secretary under section 31144; and

(C) the minimum financial responsibility requirements established by the Secretary pursuant to sections 13906 and 31138.

§ 13906. Security of motor carriers, brokers, and freight forwarders

(a) Motor carrier requirements.—

(1) Liability insurance requirement.—The Secretary may register a motor carrier under section 13902 only if the registrant files with the Secretary a bond, insurance policy, or other type of security approved by the Secretary, in an amount not less than such amount as the Secretary prescribes pursuant to, or as is required by, sections 31138 and 31139, and the laws of the State or States in which the registrant is operating, to the extent applicable. The security must be sufficient to pay, not more than the amount of the security, for each final judgment against the registrant for bodily injury to, or death of, an individual resulting from the negligent operation, maintenance, or use of motor vehicles, or for loss or damage to property (except property referred to in paragraph (3) of this subsection), or both. A registration remains in effect only as long as the registrant continues to satisfy the security requirements of this paragraph.

APPENDIX E

REGULATORY PROVISIONS INVOLVED

Pertinent provisions of the federal regulations governing motor carriers are printed at 49 C.F.R. § 387.1 *et seq.* as follows:

§ 387.1. Purpose and scope.

This subpart prescribes the minimum levels of financial responsibility required to be maintained by motor carriers of property operating motor vehicles in interstate, foreign, or intrastate commerce. The purpose of these regulations is to create additional incentives to motor carriers to maintain and operate their vehicles in a safe manner and to assure that motor carriers maintain an appropriate level of financial responsibility for motor vehicles operated on public highways.

[46 FR 30982, June 11, 1981, as amended at 48 FR 52683, Nov. 21, 1983]

§ 387.7. Financial responsibility required.

(a) No motor carrier shall operate a motor vehicle until the motor carrier has obtained and has in effect the minimum levels of financial responsibility as set forth in Sec. 387.9 of this subpart.

. . . .

(d) Proof of the required financial responsibility shall be maintained at the motor carrier's principal place of business. The proof shall consist of—

(1) "Endorsement(s) for Motor Carrier Policies of Insurance for Public Liability Under Sections 29 and 30 of the Motor Carrier Act of 1980" (Form MCS-90) issued by an insurer(s);

(2) A "Motor Carrier Surety Bond for Public Liabil-

ity Under Section 30 of the Motor Carrier Act of 1980" (Form MCS-82) issued by a surety; or

(3) A written decision, order, or authorization of the Interstate Commerce Commission authorizing a motor carrier to self-insure under Sec. 1043.5 of this title, provided the motor carrier maintains a satisfactory safety rating as determined by the Federal Highway Administration under part 385 of this title.

(e) The proof of minimum levels of financial responsibility required by this section shall be considered public information and be produced for review upon reasonable request by a member of the public.

(f) All vehicles operated within the United States by motor carriers domiciled in a contiguous foreign country, shall have on board the vehicle a legible copy, in English, of the proof of the required financial responsibility (Form MCS-90 or MCS-82) used by the motor carrier to comply with paragraph (d) of this section.

(g) Any motor vehicle in which there is no evidence of financial responsibility required by paragraph (f) of this section shall be denied entry into the United States.

[46 FR 30982, June 11, 1981; 46 FR 45612, Sept. 14, 1981, as amended at 48 FR 5559, Feb. 7, 1983; 48 FR 52683, Nov. 21, 1983; 51 FR 22083, June 18, 1986; 54 FR 49092, Nov. 29, 1989; 59 FR 63923, Dec. 12, 1994]

§ 387.15. Forms

Endorsements for policies of insurance (Illustration I) and surety bonds (Illustration II) must be in the form prescribed by the FHWA and approved by the OMB. Endorsements to policies of insurance and surety bonds shall specify that coverage thereunder will remain in effect continuously until terminated, as required in Sec. 387.7 of this subpart.

The continuous coverage requirement does not apply to Mexican motor carriers insured under Sec. 387.7(b)(3) of this subpart. The endorsement and surety bond shall be issued in the exact name of the motor carrier.

ILLUSTRATION I

Form MCS-90 (3/82)

Form Approved

OMB No. 2125-0074

ENDORSEMENT FOR MOTOR CARRIER POLICIES OF INSURANCE FOR PUBLIC LIABILITY UNDER SECTIONS 29 AND 30 OF THE MOTOR CARRIER ACT OF 1980

Issued to_____

of _____

Dated at_____

this ____ day of _____, 19____

Amending Policy No._____

Effective Date_____

Name of Insurance Company_____

Countersigned by_____

Authorized Company Representative

The policy to which this endorsement is attached provides primary or excess insurance, as indicated by "X", for the limits shown:

☐ This insurance is primary and the company shall not be liable for amounts in excess of $_____ for each accident.

☐ This insurance is excess and the company shall not be

liable for amounts in excess of $_____ for each accident in excess of the underlying limit of $_____ for each accident.

Whenever required by the FHWA or the ICC the company agrees to furnish the FHWA or the ICC a duplicate of said policy and all its endorsements. The company also agrees, upon telephone request by an authorized representative of the FHWA or the ICC, to verify that the policy is in force as of a particular date. The telephone number to call is:

_____

Cancellation of this endorsement may be effected by the company or the insured by giving (1) thirty-five (35) days notice in writing to the other party (said 35 days notice to commence from the date the notice is mailed, proof of mailing shall be sufficient proof of notice), and (2) if the insured is subject to the ICC's jurisdiction, by providing thirty (30) days notice to the ICC (said 30 days notice to commence from the date the notice is received by the ICC at its office in Washington, DC).

DEFINITIONS AS USED IN THIS ENDORSEMENT

Accident includes continuous or repeated exposure to conditions which results in bodily injury, property damage, or environmental damage which the insured neither expected or intended.

Motor Vehicle means a land vehicle, machine, truck, tractor, trailer, or semitrailer propelled or drawn by mechanical power and used on a highway for transporting property, or any combination thereof.

Bodily Injury means injury to the body, sickness, or disease to any person, including death resulting from any of these.

Environmental Restoration means restitution for the loss, damage, or destruction of natural resources arising out of the

accidental discharge, dispersal, release or escape into or upon the land, atmosphere, watercourse, or body of water, of any commodity transported by a motor carrier. This shall include the cost of removal and the cost of necessary measures taken to minimize or mitigate damage to human health, the natural environment, fish, shellfish, and wildlife.

Property Damage means damage to or loss of use of tangible property.

Public Liability means liability for bodily injury, property damage, and environmental restoration.

The insurance policy to which this endorsement is attached provides automobile liability insurance and is amended to assure compliance by the insured, within the limits stated herein, as a motor carrier of property, with sections 29 and 30 of the Motor Carrier Act of 1980 and the rules and regulations of the Federal Highway Administration and the Interstate Commerce Commission (ICC).

In consideration of the premium stated in the policy to which this endorsement is attached, the insurer (the company) agrees to pay, within the limits of liability described herein, any final judgment recovered against the insured for public liability resulting from negligence in the operation, maintenance or use of motor vehicles subject to the financial responsibility requirements of sections 29 and 30 of the Motor Carrier Act of 1980 regardless of whether or not each motor vehicle is specifically described in the policy and whether or not such negligence occurs on any route or in any territory authorized to be served by the insured or elsewhere. Such insurance as is afforded, for public liability, does not apply to injury to or death of the insured's employees while engaged in the course of their employment, or property transported by the insured, designated as cargo. It is understood and agreed that no condition, provision, stipulation, or limitation contained in the policy, this endorsement, or any

other endorsement thereon, or violation thereof, shall relieve the company from liability or from the payment of any final judgment, within the limits of liability herein described, irrespective of the financial condition, insolvency or bankruptcy of the insured. However, all terms, conditions, and limitations in the policy to which the endorsement is attached shall remain in full force and effect as binding between the insured and the company. The insured agrees to reimburse the company for any payment made by the company on account of any accident, claim, or suit involving a breach of the terms of the policy, and for any payment that the company would not have been obligated to make under the provisions of the policy except for the agreement contained in this endorsement.

It is further understood and agreed that, upon failure of the company to pay any final judgment recovered against the insured as provided herein, the judgment creditor may maintain an action in any court of competent jurisdiction against the company to compel such payment.

The limits of the company's liability for the amounts prescribed in this endorsement apply separately to each accident and any payment under the policy because of any one accident shall not operate to reduce the liability of the company for the payment of final judgments resulting from any other accident.

§ 387.301. Surety bond, certificate of insurance, or other securities.

(a) *Public liability.* (1) No common or contract carrier or foreign (Mexican) motor private carrier or foreign motor carrier transporting exempt commodities subject to subchapter II, chapter 105, subtitle IV of title 49 of the U.S. Code shall engage in interstate or foreign commerce, and no certificate or permit shall be issued to such a carrier or remain in force

unless and until there shall have been filed with and accepted by the Commission surety bonds, certificates of insurance, proof of qualifications as self-insurer, or other securities or agreements, in the amounts prescribed in Sec. 387.303, conditioned to pay any final judgment recovered against such motor carrier for bodily injuries to or the death of any person resulting from the negligent operation, maintenance or use of motor vehicles in transportation subject to subchapter II, chapter 105, subtitle IV of title 49 of the U.S. Code, or for loss of or damage to property of others, or, in the case of motor carriers of property operating freight vehicles described in Sec. 387.303(b)(2) of this part, for environmental restoration.

MOTION FILED

APR 12 2001

(2)

No. 00-1491

In The

Supreme Court of the United States

JOHN DEERE INSURANCE COMPANY,

Petitioner,

v.

GUILLERMO NUEVA AND LOS ANGELES COUNTY METROPOLITAN TRANSPORTATION AUTHORITY,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE* NATIONAL ASSOCIATION OF INDEPENDENT INSURERS, IN SUPPORT OF PETITIONER

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MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* OF THE NATIONAL ASSOCIATION OF INDEPENDENT INSURERS IN SUPPORT OF PETITIONER.

Pursuant to Rule 37.2 of the rules of this Court, the National Association of Independent Insurers (hereinafter "NAII") respectfully moves this Court for leave to file the attached brief *amicus curiae* in support of the petitioner, John Deere Insurance Company (hereinafter "John Deere"). Petitioner has given its consent to NAII to file its *amicus brief*. The NAII further states that the respondent has witheld consent. Letters from both petitioner and respondent were submitted to the Court with this brief.

The NAII is a leading voice in the insurance industry. The NAII is the largest property and casualty insurance trade association in the United States in terms of the number of total member insurance companies and in terms of total premium dollars written by its more than 600 member insurers.

Members of the NAII transact business, offer insurance products, investigate claims, mediate and settle disputes and provide legal defense to millions of corporate and individual policyholders across the United States. Companies of every size and type comprise the NAII from companies that conduct business in limited geographic regions to large commercial enterprises that transact business from coast to coast.

One significant population of insurance consumers served by the NAII membership is the trucking industry. The NAII and its member companies are deeply concerned about the issues raised by John Deere in this case. The NAII believes that unambiguous insurance contracts

should be interpreted as they are written. The NAII further supports the Constitution's express prohibition barring any state from passing any law impairing the obligations in contracts entered into by the contracting parties. The NAII further supports this Court's ruling in *Lynch v. United States*, 292 U.S. 571 (1934) where this Court held that the Due Process Clause of the Fifth Amendment creates essentially the same ban on the federal government.

The NAII and its membership believe that endorsement MCS-90 can not constitutionally be interpreted to expand insurance coverage to individuals that are not insureds under an unambiguous insurance policy contract. The NAII and its members aver that endorsement MCS-90 can not constitutionally be read to require insurers to provide coverage for non-covered automobiles not specifically contemplated by an unambiguous insurance policy contract. Any conclusion to the contrary may violate the spirit of Article I, Section 10(1) and the Fourteenth Amendment of the Constitution, and that the Ninth Circuit's expansive application of MCS-90 here clearly violates the Fifth Amendment of the Constitution.

This Court should grant John Deere's petition for a writ of certiorari so that this Court can reconcile the apparent conflict between the language of endorsement MCS-90 and the Fifth Amendment of the Constitution. Moreover, this Court should further grant John Deere's petition for a writ of certiorari because the rulings made by the United States Court of Appeals for the Third, Fifth, Eighth and District of Columbia Circuits on the important issue raised by John Deere are in conflict with rulings in

the United States Court of Appeals for the Ninth and Tenth Circuits. Finally, the NAII and its member companies further urge this Court to grant John Deere's petition for a writ for certiorari because the effect of the Ninth and Tenth Circuits rulings may have a substantial impact on the premiums charged to consumers of commercial liability insurance policies. The Ninth and Tenth Circuits' rewrite of clear policy language and their expansive reading of endorsement MCS-90 will require insurers like John Deere and others to be responsible for the payment of losses that are clearly not required under their policy nor endorsement MCS-90 and which were not bargained for nor contemplated by the parties at the time of issuance of the insurance policy. The additional financial obligations that insurers will be required to face under the Ninth and Tenth Circuits' rulings may have a serious impact on the overall cost of insurance to consumers across the nation.

For these reasons, the NAII hereby respectfully requests that this Court grant the NAII's motion to file its brief *amicus curiae* and further requests that this Court grant John Deere's petition for a writ of certiorari.

Respectfully submitted,

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April 12, 2001

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STATEMENT OF INTEREST OF *AMICUS CURIAE*[1]

The statement of interest of *Amicus Curiae* the National Association of Independent Insurers (hereinafter "NAII") is fully set forth in the motion accompanying this brief.

SUMMARY OF ARGUMENT

The United States Constitution prohibits states and the federal government from passing any law that impairs the rights and obligations of private parties in contracts. This constitutional prohibition has been recognized and enforced by this Court, as well as numerous federal appellate and state courts across the nation.

Legislatures and courts are prohibited from rewriting the material terms and conditions of existing insurance contracts under the Fifth Amendment of the United States Constitution. Generally, legislation that attempts to make material alterations of the character, terms or legal effect of existing contracts is clearly void.

In the instant case, the express terms of MCS-90 apply only to the duties and obligations of the insurer and the insured identified in the policy. There is clearly no coverage under the John Deere policy for automobiles that are not contemplated within the meaning of the

[1] Counsel for a party did not author this brief in whole or in part. No person or entity, other than *Amici Curiae*, their members, or their counsel, made a monetary contribution to the preparation and submission of this brief.

policy and likewise there is no coverage afforded under this policy or the MCS-90 endorsement for any person or entity that is not a party to the contract. The express terms and conditions of endorsement form MCS-90 are consistent with these principles. Endorsement form MCS-90 specifically provides that its terms and conditions apply only to the parties to the insurance contract, namely, the insurer and the insured.

The Ninth Circuit's attempt to expand the scope of coverage provided under either the John Deere policy or MCS-90 expands the nature and type of losses that the insurer is required to pay. The Ninth Circuit's decision further expands the parties to which the insurer is required to pay. The Ninth Circuit's ruling here clearly constitutes a prohibited expansion or modification of the significant terms and conditions of a contract. The Constitution clearly prohibits judicial expansion of key contract provisions without the authorization and consent of the parties to that contract.

A basic and cherished principle in this nation is that the rights of parties to structure contracts in accordance with their wishes and expectations is protected under our Constitution. If the freedom to contract under the Constitution is to retain any meaning at all, it must be understood that it does impose limitations upon the power of legislatures to abridge existing contractual relationships.

Government intermeddling with business essentially private in nature is repugnant to the fundamental concept of free enterprise. Such interference with private citizens' right to contract clearly violates the central freedoms afforded under the Constitution.

The Ninth Circuit's ruling joins the decision reached by the Tenth Circuit in *Adams v. Royal Indem. Co.*, 99 F.3d 964 (10th Cir. 1996), where that court also modified and expanded the clear meaning of the MCS-90 endorsement. Until the Ninth Circuit ruled in the instant case, the Tenth Circuit stood alone as the minority viewpoint as to the scope of coverage afforded under the MCS-90. The Tenth Circuit has for more than two decades interpreted the MCS-90 endorsement in a manner contrary to that of its sister federal courts of appeal. A clear conflict now exists between the federal courts of appeal on the scope of coverage afforded by the MCS-90. For this reason alone, this Court should grant John Deere's petition for a writ of certiorari.

The *Amicus* acknowledges that the right to freely contract is not absolute. There are certain limited and exceptional circumstances where a legislature may alter private contracts and such legislative acts will withstand constitutional challenge. However, the Ninth Circuit failed to identify that any limited or exceptional circumstances existed in the instant case that justified its redrafting of the clear and unambiguous language in the John Deere policy and the MCS-90 endorsement. Thus, the Ninth Circuit had no basis to substantiate its ruling that expands the scope of coverage afforded under the MCS-90 endorsement.

The decision of the Ninth Circuit must be vacated by this Court and the rights of John Deere and its insured to be bound only by the clear and express terms and conditions of the insurance policy and MCS-90 endorsement must be reinstated. Otherwise, if the Ninth Circuit's decision and expansive reading of the MCS-90 is permitted to

stand, a mixed message will be sent to courts across the country about how far a legislature, or a court for that matter, may go to re-write an otherwise unambiguous private contract. Furthermore, individuals across the nation will be forced to enter into private contracts with a significant degree of uncertainty as to whether their duties and obligations under their contracts will be changed without warning at some point by a state or federal legislature.

ARGUMENT

I. JOHN DEERE'S PETITION FOR A WRIT OF CERTIORARI SHOULD BE GRANTED BECAUSE THE NINTH CIRCUIT'S EXPANSION OF THE INSURANCE COVERAGE AFFORDED UNDER THE JOHN DEERE POLICY AND THE MCS-90 ENDORSEMENT VIOLATES THE FIFTH AMENDMENT OF THE UNITED STATES CONSTITUTION.

A. Any Legislative Enactment That Imposes Additional Duties Or Responsibilities On Parties To A Contract Is Void If It Produces A Change In The Obligations Or Substantial Rights Of A Party.

This Court should grant John Deere's petition for a writ of certiorari because the effect of the Ninth Circuit's ruling clearly creates an unconstitutional expansion of John Deere's duties and obligations under its insurance policy.

Article I, section 10, of the United States Constitution provides that no state shall pass any bill or law that

impairs the obligations of parties to contracts. U.S. Const. art. I. *See also, Tidal Oil v. Flanagan,* 263 U.S. 444 (1924). Although no explicit constitutional language protects the sanctity of contract against federal legislation, this Court has held that the Due Process Clause in the Fifth Amendment contains essentially the same effect. *Lynch v. United States,* 292 U.S. 571 (1934) (invalidating Congressional attempts to cancel certain types of insurance policies). Both the federal and states' constitutions prohibit the enactment of laws impairing the obligations of contracts. *Superior Motors, Inc. v. Winnebago Indus., Inc.,* 359 F.Supp. 773, 777 (D.S.C. 1973). For nearly two centuries, this Court has steadfastly invalidated legislative acts that substantially impair or affect the contractual rights of parties. *See generally, Fletcher v. Peck,* 10 U.S. 87 (1810); *College v. Woodward,* 17 U.S. 518 (1819); *New Jersey v. Wilson,* 11 U.S. 164 (1834); *Perry v. United States,* 294 U.S. 330 (1935).

Generally, legislation that attempts to make material alterations of the character, terms or legal effect of existing contracts is clearly void. 16A C.J.S. Constitutional Law, section 353 et seq. Of this character are statutes that attempt to add a material condition or provision to a contract and those which attempt to release stipulations therein. *Id.* It may be said that a legislative enactment impairs the obligations of a contract when it attempts to take from a party a right that he is entitled to by its terms. *Superior Motors, Inc.,* 359 F.Supp. at 773. Thus, legislation which attempts to make material alterations in the character, terms or legal effect of an existing contract impairs the obligations of that contract. *Id.* at 777. Moreover, statutes are void if they impose added conditions or

duties on parties to a contract. *Id. See also,* 16A C.J.S. Constitutional Law, section 353 et seq.

Other material alterations that would impair the obligations of contracts are those that alter the extent of liability under a contract or which empower courts to rewrite contractual agreements substantially. 16A C.J.S. Constitutional Law, section 353 et seq.

In the instant case, the express terms of MCS-90 apply only to the duties and obligations of the insurer and the insured identified in the policy. There is clearly no coverage under the John Deere policy for automobiles that are not contemplated within the meaning of the policy and likewise there is no coverage afforded under this policy or the MCS-90 endorsement for any person or entity that is not a party to the contract. The express terms and conditions of endorsement form MCS-90 are consistent with these principles. Endorsement form MCS-90 specifically provides that its terms and conditions apply only to the parties to the insurance contract, namely, the insurer and the insured.

Any attempt to expand the scope of coverage provided under either the John Deere policy or MCS-90 that would expand the nature and type of losses that the insurer is required to pay, or that which expands the parties on behalf of which the insurer is required to pay, clearly constitutes a prohibited expansion or modification of the significant terms and conditions of a contract. The Constitution clearly prohibits such an expansion of key contract provisions without the authorization and consent of the parties to that contract.

A basic and cherished principle in this nation is that the right of parties to structure contracts in accordance with their wishes and expectations is protected under our Constitution. *See generally, Hedge v. Evans Financial Corp.*, 707 F.2d 1566 (D.C.Cir. 1983). If the freedom to contract under the Constitution is to retain any meaning at all, it must be understood that it does impose limitations upon the power of legislatures to abridge existing contractual relationships. *Allied Structural Steel v. Spannaus*, 438 U.S. 234 (1978). This constitutional guarantee is not limited to individuals. Commercial parties are also afforded constitutional protections to enter into contracts freely and to accept only those terms and conditions that they desire to undertake. *Mellon Bank, N.A. v. Aetna Business Credit, Inc.*, 619 F.2d 1001 (3rd Cir. 1980).

Here, the effect of the ruling by the Ninth Circuit is inconsistent with the constitutional guarantees afforded to persons and corporations to enter into contracts freely and to be subject only to those terms and conditions that they contemplate and accept. The Ninth Circuit's expansive interpretation of the John Deere policy and MCS-90 imposes new duties and obligations on the insurer that (1) are not set forth in the actual policy language nor in the language of MCS-90, (2) were not agreed to by the insurer and the insured, and (3) are not part of the insurance policy and MCS-90 endorsement actually issued to the policyholder. The Ninth Circuit has essentially rewritten the material terms and conditions of the John Deere policy and endorsement MCS-90 without the parties' consent. This unilateral expansion of coverage afforded under the John Deere policy and MCS-90 by the

Ninth Circuit violates the Constitution's guarantees of freedom to contract.

Accordingly, this Court should grant John Deere's petition for a writ of certiorari so that the freedom to contract freely will continue to be upheld as one of the central freedoms afforded to the citizenry of the United States.

B. The Effect Of The Ninth Circuit's Ruling Renders An Unconsitutional Application Of MCS-90 Because It Substantially Changes John Deere's Rights Under Its Insurance Policy.

Any legislation that alters the extent of an insurer's liability under an insurance policy contract or which empowers courts to substantially re-write an insurance policy's terms and conditions is unconstitutionally invalid. *See generally,* 16A C.J.S. Constitutional Law, section 353 et seq.

In this case, the John Deere policy at issue was amended and supplemented by endorsement MCS-90, which was required by law to be added to Motor Carrier Liability Policies pursuant to sections 29 and 30 of the Motor Carrier Act of 1980, 49 U.S.C. Section 10927. *John Deere v. Neuva, et al.,* 229 F.3d 853 (9th Cir. 2000). The MCS-90 endorsement was required to be attached to any liability policy issued to a certified interstate carrier. 49 C.F.R. section 1003.3. The MCS-90 provided:

> In consideration of the premium stated in the policy to which this endorsement is attached, the insurer agrees to pay, within the limits of liability described herein, any final judgment

> recovered ***against the insured*** for public liability resulting from negligence in the operation, maintenance or use of motor vehicles subject to the financial responsibility requirements of Sections 29 and 30 of the Motor Carrier Act of 1980, regardless of whether or not each motor vehicle is specifically described in the policy. . . . It is understood and agreed that no condition, provision, stipulation, or limitations in the policy, this endorsement, or any other endorsement thereon, or violation thereof, shall relieve the company from liability or from any payment of any final judgment, within the limits of liability herein described, irrespective of the financial condition, insolvency or bankruptcy ***of the insured***. However, all terms, conditions and limitations in the policy to which this endorsement is attached shall remain in full force and effect as binding between ***the insured*** and the company. ***The insured*** agrees to reimburse the company for any payment made by the company on account of any accident, claims or suit involving a breach of the terms of the policy, and for any payment that the company would not have been obligated to make under the provisions of the policy except for the agreement contained in this endorsement.

John Deere, 229 F.3d at 968. (Emphasis added).

By requiring all such described insurance policies to contain this endorsement, the ICC sought to prevent the possibility that, through inadvertence or otherwise, some vehicles may be left off a policy to the detriment of the public. *See, Empire Fire & Marine Ins. Co. v. Guaranty Nat'l Ins. Co.*, 868 F.2d 357 (10th Cir. 1989). Said another way,

the endorsement was designed to eliminate the possibility of a denial of coverage by an insurer based upon an "excess" or "other insurance" clause or any other provision limiting provisions contained in the policy. *John Deere*, 229 F.3d at 855.

The *Amicus* believes the Ninth Circuit erred when it ignored the unambiguous language of the policy and endorsement MCS-90 and instead expanded the scope of coverage to an extent not contemplated by the parties. The language of the endorsement is clear. The endorsement only contemplates two parties to the policy – the insurer and *the insured*. Any party not specifically contemplated within the policy's definitions of insured has no valid claim for coverage under either the policy or the MCS-90 endorsement. This clear and unambiguous language in both the policy and endorsement MCS-90 was ignored by the Ninth Circuit Court.

The MCS-90 endorsement has been interpreted to apply only to the insurer and to the insured by federal appellate courts. In *Wellman v. Liberty Mutual Ins. Co.*, 498 F.2d 131 (8th Cir. 1974), the Eighth Circuit court rejected the petition that the MCS-90 endorsement and the policy to which it was attached afforded any rights to any party other than the insurer and the insured.

Similarly, in *Carolina Ins. Co. v. Insurance Co. of N. Am.*, 595 F.2d 128 (3rd Cir. 1979), the court held that duties and responsibilities in the MCS-90 endorsement applied only to the insurer and to the insured. Indeed, numerous other courts have also taken the view. *See generally, White v. Excalibur Ins. Co.*, 559 F.2d 50 (5th Cir.), *cert. denied*, 444 U.S. 965 (1975); *Radman v. Jones Motor Co.*,

Inc., 914 F.Supp. 1193 (W.D.Pa. 1996), *aff'd*, 100 F.3d 948 (3rd Cir. 1996) (court adopted the rationale in *Wellman*); *Del Real v. United States Fire Ins. v. Crum & Forster*, 64 F.Supp.2d 958 (E.D.Cal. 1998), *aff'd*, 188 F.3d 512 (9th Cir. 1999); *Pratt v. Andrews*, 164 Ill.App.3d 606; 518 N.E.2d 184 (1987); *Nowak v. Transport Indem. Co.*, 120 Wis.2d 635, 358 N.W. 2d 294 (Wis.Ct.App. 1984); *Transport Indemn. Co. v. Teter*, 575 S.W.2d 780 (Mo.Ct.App. 1978).

The Ninth Circuit's ruling runs afoul of the long line of decisions by this Court and courts across the nation that protect the right to freely contract. This ruling has further fueled an existing conflict among the federal circuit courts of appeal on the scope of the MCS-90 endorsement and conveys an ambiguous and mixed message as the issue of whether state and federal legislatures can unilaterally re-write the terms and conditions of existing contracts.

The Ninth Circuit's ruling joins the decision reached by the Tenth Circuit in *Adams v. Royal Indem. Co.*, 99 F.3d 964 (10th Cir. 1996), wherein that court also modified and expanded the clear meaning of the MCS-90 endorsement. Until the Ninth Circuit ruled, the Tenth Circuit stood alone as the minority viewpoint as to the scope of coverage afforded under the MCS-90. The Tenth Circuit has for more than two decades interpreted the MCS-90 endorsement in a manner contrary to that of its sister federal courts of appeal. *See, generally*, 157 A.L.R.Fed. 549 ("The Tenth Circuit is the federal circuit that espouses the "minority" view . . . "). A clear conflict now exists between the federal courts of appeal on the scope of coverage afforded by the MCS-90. For this reason alone,

this Court should grant John Deere's petition for a writ of certiorari.

Government intermeddling with business, essentially private in nature, is repugnant to the fundamental concept of free enterprise. *Superior Motors, Inc.*, 359 F.Supp. at 778. Such interference with private citizens' right to contract clearly violates the central freedoms afforded under the Constitution. The Ninth and Tenth Circuit courts of appeal have misconstrued the plain meaning of the MCS-90 endorsement and have created a conflict in the law where one should not exist. This Court has historically protected the rights of this nation's citizens to freely contract. These rights are not in jeopardy in light of the minority view espoused by the Ninth and Tenth Circuit courts of appeal. This Court should grant John Deere's petition for a writ of certiorari here to prevent future confusion by state and federal courts on the issue of the scope of coverage afforded under MCS-90, and moreover to prevent any further deterioration of the rights of this nation's citizens to freely contract. For these reasons, *Amicus Curiae* the NAII respectfully requests that this Court grant John Deere's petition for a writ of certiorari.

II. GOVERNMENT ALTERATIONS OF PRIVATE CONTRACTS ARE PERMITTED ONLY IN LIMITED AND EXCEPTIONAL CIRCUMSTANCES, NONE OF WHICH ARE PRESENT HERE.

The *Amicus* acknowledges that the right to freely contract is not absolute. There are certain limited and exceptional circumstances where a legislature may alter

private contracts and such legislative acts will withstand constitutional challenge.

The first exceptional circumstance where a legislature may alter private contractual terms and conditions is where the parties to the contract affected by the modification give their consent to such alteration. *See, generally,* 16A C.J.S. Constitutional Law, section 344. In the instant case, there are no facts that suggest that John Deere or its insured gave consent to the ICC, the United States Department of Transportation, or to the Ninth Circuit court to modify the John Deere policy or the MCS-90 endorsement. Clearly, the "consent" exception is inapplicable here.

During periods of emergency, alterations are sometimes authorized and held not unconstitutional as an impairment of the contractual obligation. *See generally,* 16A C.J.S. Constitutional Law, section 344. Again, the record contains no evidence that any pressing emergency justified the Ninth Circuit's expansion of coverage afforded by John Deere to its insured under its policy or the MCS-90 endorsement. In the absence of any evidence of any such exigent circumstances, the "emergency" exception clearly did not apply so as to warrant the Ninth Circuit's redrafting of the John Deere policy and the MCS-90 endorsement in the instance case.

A legislature may also exercise the right to alter private contracts where the interests of the public welfare are at stake. The Ninth Circuit applied this "public welfare" circumstance to justify its expansion of the coverage afforded by the John Deere policy and the MCS-90 endorsement. The Ninth Circuit court reasoned:

> The [insureds] in the instant case are injured members of the public, and thus are precisely the group meant to be protected by the MCS-90.

John Deere, 229 F.3d at 857. The *Amicus* suggests that the mere fact that the insureds were "members of the public" in and of itself was insufficient reason to justify the Ninth Circuit's intrusion into the private contract between John Deere and its insured. The *Amicus* suggests that the "public welfare" exception that permits alteration of private contracts in some circumstances should only apply where there is a clear danger that the public's health and safety may be at imminent risk.

The MCS-90 was designed only to serve as a reimbursement mechanism for losses. There is no provision in the MCS-90 that requires any party to undertake any safety-related or health-related measures to further the interests of "public welfare." The MCS-90's reimbursement mechanisms do nothing to reduce risks of injuries to common carriers. To the contrary, the duties and obligations imposed upon the insurer and the insured under the MCS-90 endorsement are triggered only after there has been a loss or injury.

The Ninth Circuit's reliance upon the "public interest" circumstance is misplaced and is clearly not justified upon closer examination of the workings of the MCS-90. Where the MCS-90 does not require risk management, inspections, the implementation of safety processes, or does anything in any way to directly prevent or reduce the risk of harm to the "public," there is no "public interest" to justify the Ninth Circuit's invasion into the private right of contract between private citizens. Said another way, the MCS-90 endorsement acts only as a

predetermined method of allocation or reimbursement of loss costs between the insurer and its insured. This function does not relate to the "public interest" in any way contemplated by the "public interest" circumstance that affords a legislature license to alter private contracts. Accordingly, the Ninth Circuit's reliance upon this exception is not justified in the instant case.

Because the Ninth Circuit failed to identify that any limited or exceptional circumstance existed to justify its redrafting of the clear and unambiguous language in the John Deere policy and the MCS-90 endorsement, the Ninth Circuit had no legal basis to substantiate its ruling that expanded the scope of coverage afforded under the MCS-90 endorsement.

The decision of the Ninth Circuit must be vacated by this Court and the rights of John Deere and its insured to be bound only by the clear and express terms and conditions of the insurance policy and MCS-90 endorsement must be reinstated. Otherwise, if the Ninth Circuit's decision and expansive reading of the MCS-90 is permitted to stand, a mixed message will be sent to courts across the country about how far a legislature, or a court for that matter, may go to re-write an otherwise unambiguous private contract. Furthermore, individuals across the nation will be forced to enter into private contracts with a significant degree of uncertainty as to whether their duties and obligations under their contracts will be changed without warning at some point by a state or federal legislature, or by a court.

Accordingly, the *Amicus* NAII respectfully requests that John Deere's petition for a writ of certiorari be granted by this Court.

CONCLUSION

Amicus Curiae National Association of Independent Insurers respectfully requests that John Deere's petition for writ of certiorari be granted.

Respectfully submitted,

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No. 00-1491

In The

Supreme Court of the United States

JOHN DEERE INSURANCE COMPANY,

Petitioner,

v.

GUILLERMO NUEVA & LOS ANGELES COUNTY METROPOLITAN TRANSPORTATION AUTHORITY,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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4 OPP

QUESTION PRESENTED

Whether the Form MCS-90 Endorsement, issued with a motor carrier's liability insurance policy which defines "insured" to include permissive users of the motor carrier's owned, covered vehicles, requires the issuing insurer to pay a final judgment entered against a permissive user of the motor carrier's owned vehicle when that vehicle is not specifically described in the policy.

DISCLOSURE PURSUANT TO RULE 29.6

Respondents are the Los Angeles County Metropolitan Transportation Authority, a public corporation of the State of California, organized under the authority of Section 30,000 et seq. of the Public Utilities Code, and Guillermo Nueva, an individual. The Los Angeles County Metropolitan Transportation Authority has no parent company and is not a publicly held company.

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STATEMENT OF THE CASE

In response to the possibility that injured members of the public would be without redress against negligent operators of Interstate Commerce Commission ("ICC") regulated vehicles, Congress enacted the Motor Carrier Act of 1980. Congress directed the ICC to promulgate regulations requiring that all operators of regulated motor vehicles be able to respond in damages to an injured member of the public. The ICC drafted the MCS-90 Endorsement to meet this requirement and required that it be added to all regulated carriers' automobile policies.[1]

Respondents were injured in an accident when the permissive users of a vehicle owned by John Deere's named insured, Baljit Singh Sahota dba Sahota Trucking ("Sahota"), slammed into Respondents' vehicle. The insurance policy John Deere issued to Sahota contained an MCS-90 Endorsement providing that John Deere would pay all judgments rendered against the "insured" for any liability arising out of the use of any vehicle.

John Deere contends that the "insured" means only its named insured Sahota, and not any persons using Sahota's owned vehicles with Sahota's permission.[2]

---

[1] It is the effect of the MCS-90 Endorsement on this case that is at issue. If Petitioner John Deere Insurance Company has its way, the MCS-90 Endorsement would be meaningless in this case and Respondents, as injured members of the public, would be without redress, frustrating express Congressional mandates.

[2] Contrary to its own policy language which defines "insured" to include permissive users.

Respondents contend that the plain language of the MCS-90, and the legislative history and public policy behind it, expand the definition of "insured" to include permissive users of Sahota's non-scheduled, but owned vehicles. Respondents further contend that given this "expansion" of the definition of "insured" under the John Deere policy, John Deere must pay the judgments rendered against the permissive users. The Ninth Circuit agreed with Respondents. Now, John Deere wants the Ninth Circuit's decision overturned.

John Deere bases its petition on an asserted conflict between the United States Courts of Appeals, as is required to invoke this Court's discretionary review. (United States Supreme Court Rule 10) However, there is *absolutely no conflict* between the only two Circuits which have addressed these issues on these facts, the Ninth and Tenth. **They are in complete agreement.** The four cases John Deere cites to show the purported "conflict" in fact do not give rise to one. John Deere's chief reason for granting the writ thus fails. John Deere's ancillary reasons for granting the writ are similarly meritless.

John Deere knew that by the mandatory inclusion of the MCS-90 Endorsement on its policy insuring Sahota it might be required to indemnify for claims not covered by the basic policy. This is the whole point of the MCS-90 endorsement. Despite knowledge that it might be called upon to pay judgments for accidents caused by permissive users of its insured's owned vehicles, John Deere now cries foul, citing a purported "conflict" among the Circuit Courts which does not actually exist. If this request is granted and the decision of the Ninth Circuit overturned, the result will be that injured members of the

public will be left without any remedy whatsoever. Simply put, John Deere wants to avoid paying judgments rendered against persons using Sahota's vehicles with Sahota's permission. If it is allowed to do so, the purpose behind the MCS-90 Endorsement, the protection and indemnification of the public, would be thwarted. This must not occur, and the writ must be denied.

A. Factual Background.[3]

This case arises out of a November 24, 1995 vehicle accident in which a bus belonging to Respondent Los Angeles County Metropolitan Transportation ("LACMTA") was totaled and Respondent Guillermo Nueva ("Nueva"), LACMTA's employee driver, was severely injured. The bus was hit by a tractor/trailer rig driven by Gurmukh Singh Garcha ("Garcha").[4] The tractor was owned by Inderjit Singh and Gurmukh Singh Garcha dba Blue Star Trucking ("Blue Star"). **Garcha and Blue Star lacked their own insurance[5] at the time of the accident and are without assets to satisfy the judgments against them.**

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[3] In addition to the following, the decision of the Ninth Circuit below sets forth the relevant procedural events of this case and the relevant factual information. (Petition at App. A, pages 1a to 15a)

[4] Fortuitously, with the exception of Nueva, the bus was unoccupied at the time of the collision or there would be multiple claims in the multi-million dollar range.

[5] Except for being permissive user "insureds" under the Sahota policy, to be discussed below.

It is undisputed in this case that on the date of loss Sahota was the registered owner of the trailer portion of the rig being driven by Garcha. Sahota gave permission to Garcha and Blue Star to use the trailer in its trucking operations without confirming that Garcha or Blue Star had their own liability insurance to protect the members of the general public.

At the time of the accident, Sahota was the named insured on a policy issued by John Deere. With the knowledge and in anticipation that Sahota would be giving permission to others to operate its owned vehicles, the John Deere policy specifically included permissive users of Sahota's owned vehicles as "insureds" under the policy.[6] An MCS-90 Endorsement was attached to the policy at its issuance and was in effect at the time of the accident.

B. Procedural Background

Respondents LACMTA and Nueva sued Garcha, Blue Star and Sahota in the Los Angeles County Superior Court for damages and injuries they sustained due to the subject accident ("the underlying action"). John D[illegible]e was on full notice of these claims and defended Sahota throughout the underlying action. Respondents settled with Sahota for the statutory financial responsibility limits of liability for registered vehicle owners in the State of California, funded by John Deere. Respondents then obtained default judgments against Garcha and Blue

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[6] See Petition at App. A, pages 4a-5a.

Star, as permissive users of Sahota's vehicle. John Deere was provided with notice of all the proceedings, including the notices of and requests for default, but **voluntarily did nothing to prevent the defaults being taken.**

John Deere then brought suit against Respondents in the United States District Court, Central District of California, seeking a declaration that it had no duty to pay judgments entered against anyone but its named insured Sahota. LACMTA filed a counterclaim seeking declaratory judgment regarding who is an "insured" under the John Deere policy, as modified by the MCS-90 Endorsement, and regarding John Deere's duty to pay final judgments rendered against its "insureds," including permissive users of Sahota's vehicles. The District Court determined that John Deere had no duty to pay any judgments rendered against Garcha and Blue Star.

On appeal, the Ninth Circuit followed *Adams v. Royal Indemnity*, 99 F.3d 964 (10th Cir. 1996), the only published opinion specifically addressing the same fact pattern and interpreting the language of the MCS-90 Endorsement with reference to that fact pattern, and overruled the District Court.

REASONS FOR DENYING THE WRIT

I. There Is No Conflict Among The Federal Circuit Courts Of Appeal In Determining The Scope And Application Of An MCS-90 Endorsement To The Facts Of This Case.

John Deere recognizes that in order to invoke the discretion of this Court via petition for certiorari, its best

hope lies in arguing that there is a conflict among the United States Courts of Appeal with respect to the issues decided by the Ninth Circuit Court of Appeal in this case. (United States Supreme Court Rule 10.) However, the Ninth Circuit used as the basis for its holding the **only** other United States Court of Appeal decision that deals with the application of an MCS-90 Endorsement to essentially identical facts, *Adams v. Royal Indemnity*, 99 F.3d 964 (10th Cir. 1996). Thus, the only two United States Court of Appeals' decisions pertaining to these issues *each result in an identical holding*.

John Deere frantically searches for cases which might show the required conflict, but can present only four cases, **all predating the enactment of the MCS-90 Endorsement at issue by the Motor Carrier Act of 1980.** Unfortunately for John Deere, these cases are distinguishable on both their facts and their law. There is simply no conflict among the circuits.

A. The Tenth Circuit And The Ninth Circuit Are In Complete Agreement.

John Deere admits that the Tenth Circuit's decision in *Adams* and the decision by the Ninth Circuit in this case are essentially identical. (Petition, page 25) John Deere's argument against *Adams* (and, by extension, the Ninth Circuit's decision) is that it "fundamentally misunderstands the operation of the MCS-90 and the protection it affords." (Petition, page 25) To the contrary, the Tenth Circuit and the Ninth Circuit both understood the fundamental purpose of the MCS-90 endorsement: to protect the public.

Adams was injured by a tractor-trailer driven by John Hofer, who was using the trailer with the permission of Geigley, who in turn had leased Trailer 701 from its owner, Cactus County Distributing ("Cactus County"), a partnership which included Raymond D. Thomas ("Thomas"). *Id.* at 965-966. Adams brought suit against Hofer[7] and ultimately obtained a $1,000,000.00 default judgment. After Adams was unsuccessful in collecting the judgment from Hofer, he brought an action against Royal Indemnity Company, which had issued a policy to Geigley containing an MCS-90 Endorsement. *Id.* at 965.

The District Court granted Royal's motion for summary judgment, concluding that because the Geigley policy limited the definition of "insured" by requiring the use of a "covered auto" to be involved, Hofer was not an "insured" under that policy because Trailer 701 was not a "covered auto." The District Court also concluded that the MCS-90 Endorsement on the Geigley policy did not oblige Royal to pay the judgment against Hofer because Hofer could not be considered an "insured" under the Geigley policy, and thus would not be an "insured" under the language of the MCS-90 Endorsement. *Id.* at 966.

On appeal, the Tenth Circuit concluded that Trailer 701 was not a "covered auto" under either the Geigley policy or the Thomas policy, because the coverage provided in each was Symbol 46 coverage (covering "Specifically Described Autos", which is the same type of coverage present in the basic John Deere policy insuring Sahota). Since neither policy specifically described Trailer

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[7] Adams did **not** sue Geigley, Cactus County, or Thomas.

701, and neither named insured owned Trailer 701, it was not a "covered auto" as the basic policies defined that term. *Id.* at 967. The Tenth Circuit also concluded that Hofer was not an "insured" under the basic policies either. *Id.* at 969-970.

The Tenth Circuit then considered the effect of the MCS-90 Endorsement contained in the Geigley policy. In doing so, it looked to Congress's paramount policy of protecting the public by mandating MCS-90 Endorsements and further noted that "[b]y requiring all such described insurance policies to contain this [MCS-90] endorsement, the [Interstate Commerce Commission] prevents the possibility that, through inadvertence or otherwise, some vehicles may be left off a policy to the detriment of the public." *Id.* at 969-970. The Tenth Circuit also noted that to the extent a claim was not covered under the main policy but was covered under the MCS-90 Endorsement, the insured would have to reimburse the insurer, i.e., the limitations of coverage are still effective as between the insured and the insurer. This balanced the public policy of "protecting the public from uninsured vehicles utilized by interstate carriers with the policy of permitting insurance companies to bargain with their insureds regarding how to allocate such coverage among themselves." *Id.* at 969.

The Tenth Circuit addressed the issue of whether Hofer could be considered an "insured" under the Royal policy insuring Geigley *after the policy is modified by the endorsement*. The Court specifically noted that it had to "clearly keep in mind that Adams was, and is, **a member of the general public, which is precisely the group that**

is intended to be protected by this ICC endorsement." *Id.* at 969 (Bold added).

The Tenth Circuit concluded that the definition of "insured" in the Royal policy was "indirectly modified" by the MCS-90 Endorsement's use of the word "insured." Just as the MCS-90 Endorsement applied to all regulated vehicles, whether specifically described in the policy or not, the limiting definition of an "insured" in the policy (a person who "owns, hires, or borrows only specifically described motor vehicles") was expanded to mean all persons using regulated vehicles with the permission of the named insured. Using the more limited definition would subvert the purpose of the MCS-90 Endorsement of requiring coverage on all regulated vehicles regardless of whether or not they are specifically identified in the basic policy. The Court then held:

> **A policy with this ICC endorsement cannot explicitly limit liability to those vehicles specifically described therein, nor can it indirectly so limit coverage by attempting to define who is insured in terms of specifically described vehicles.** . . . [P]. Here, the ICC endorsement must be read to eliminate the limiting clause that coverage applies only to covered autos described in Item Four. Thus, the definition of insured in the policy, as so modified, would effectively read: **"Anyone else is an insured while using with your permission an auto you own, hire or borrow . . . "** (citation) *Id.* at 969-970 (Bold added).[8]

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[8] The Tenth Circuit cites several cases as authority to support its holding, including *Empire Fire and Marine Ins. v.*

The Tenth Circuit noted that this interpretation was consistent with the purpose of the MCS-90 Endorsement:

> By deleting the policy requirement that an insured is defined in terms of described autos, the insurer assumes the role mandated by Congress and the ICC of protecting the public from interstate truckers who either themselves utilize, **or give permission to others to utilize,** uninsured vehicles which they own, hire, or borrow, but which are not listed in their insurance policies. *Id.* at 971 (Bold added).

In the instant case, the Ninth Circuit recognized immediately that *Adam's* factual scenario was "nearly identical" to the case before it (Petition at App. A, page 11a):

- As in *Adams,* the instant case involves injured members of the public (LACMTA and Nueva) as adversaries against an insurer (John Deere), contesting coverage under an MCS-90 Endorsement;
- The MCS-90 Endorsements included in the *Adams* insurance policies and the John Deere policy here contain the same federally-mandated language regarding the inefficacy of limitations contained within the bodies of the policies;

Guaranty Nat'l Ins., 868 F.2d 357, 363 (10th Cir. 1989) and *Canal Ins. Co. v. First General Ins. Co.*, 889 F.2d 604, 610-611 (5th Cir. 1989). *Adams, supra,* at 969-970. Its holding is also in conformity with the substantive law in California with regard to insurance policy interpretation, i.e., courts will give effect to a specific endorsement when it conflicts with boilerplate policy provisions. See, e.g., *St. Paul Fire & Marine Ins. Co. v. Coss,* 80 Cal.App.3d 888, 893 (1978).

- Like the Geigley policy in *Adams*, the basic John Deere policy's definition of WHO IS AN INSURED is: "**Anyone else while using with your permission a covered 'auto' you own, hire, or borrow**" (Bold added);

- The Great Dane Trailer, like Trailer 701 in *Adams*, is not a specifically described "covered auto" under the basic John Deere policy;

- Like Hofer in *Adams*, neither Garcha nor Blue Star was a "named insured" under the basic John Deere policy;

- As in *Adams*, Garcha and Blue Star were using the trailer with Sahota's permission;

- It was undisputed that Sahota owned the Great Dane Trailer at the time of the subject accident;

- It was undisputed that the Great Dane Trailer was a vehicle subject to ICC regulations (Petition at App. A, pages 3a-7a, 11a-15a).[9]

Based upon this remarkable similarity of facts, the Ninth Circuit held that, although neither Garcha nor Blue Star was a "named insured" under the basic John Deere policy, the MCS-90 Endorsement in effect expanded the definition of "insured" under the John Deere policy to read "anyone else is an insured while using with [Sahota's] permission an auto [Sahota] own[s], hire[s] or borrow[s] regardless of whether or not such auto is specifically described in the policy." Since at the time of the

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[9] Indeed, Petitioner admits that "[t]he underlying facts are not in dispute." (Petition at page 7)

subject accident Garcha and Blue Star were using a vehicle owned by Sahota with Sahota's permission, the Ninth Circuit held that pursuant to the Tenth Circuit's holding in *Adams* and the expanded definition of "insured" under the John Deere policy, Garcha and Blue Star were "insureds" under the John Deere policy for the purposes of the MCS-90 Endorsement. Thus, John Deere had a duty to respond to any judgments entered against Garcha and Blue Star. (Petition at App. A, pages 12a-15a).

In reaching its holding, the Ninth Circuit considered the same argument being asserted by John Deere now and concluded that the limited definition of "insured" under the John Deere policy could not stand in light of the facts of this case:

> John Deere asks us to read the use of the word "insured" in the endorsement as referring only to its named "insured", Sahota. In other words, John Deere maintains that the MCS-90 only negates the "covered auto" limitation with regard to the named insured, and would not impact its obligations regarding permissive users. However, we decline to limit the endorsement in this manner. Under John Deere's proffered interpretation, the MCS-90 negates the express provision in part (a) of the "WHO IS AN INSURED" section of the policy which limits coverage to only "covered autos." This is so because without the endorsement, Sahota would not be an "insured" under the policy if he caused injury while driving a non-covered auto. It is the endorsement that would transform him into an "insured". **Thus, it is inescapable that the effect of the MCS-90 Endorsement is to**

> **modify the policy's definition of an "insured" . . . .**
>
> We conclude that the MCS-90 operates exactly in the same manner when applied to the definition of "insured" in part (b) as it does when applied to part (a) [of the "WHO IS AN INSURED" section of the John Deere policy]. In both cases, the MCS-90 negates the limitation that only users of "covered autos" are "insureds." Therefore, we conclude that under the policy before us, John Deere cannot avoid indemnifying Garcha and Blue Star by relying on the policy's narrow definition of "insured" which attempts to limit that status to permissive users of solely "covered autos". See *Adams*, 99 F.3d at 970.

Further, the Ninth Circuit observed that its holding in turn advanced the paramount purpose behind the MCS-90 Endorsement, the protection of the public:

> Under these circumstances, the MCS-90 serves the purpose it was expressly designed to serve, modifying a policy to insure the availability of insurance for negligently injured members of the public. Interpreting the endorsement in the way advocated by John Deere would frustrate this express Congressional goal. (Petition at App. A, pages 13a-14a, bold added)

The Tenth Circuit and the Ninth Circuit are the only Circuits which have dealt with the specific factual and legal issues presented. These Circuits are in complete agreement: when an entity uses, with the named insured's permission, a vehicle owned, hired, or borrowed by the named insured, that entity is an "insured" with respect to liability owed to injured members of the

public, and the insurer is obligated to pay any final judgments obtained by injured members of the public against the "insured." There is simply no conflict among the Circuits.

B. The Cases John Deere Cites To Show A Conflict Actually Pre-Date The Enactment Of The MCS-90 Endorsement At Issue And Therefore Never Interpret The Endorsement At Issue.

John Deere cites several cases for the proposition that "an insurer's obligation under the MCS-90 . . . is triggered only by the entry of judgment against the motor carrier named in the insurance policy to which it is attached." (Petition at page 20). These cases do not stand for that proposition, and in any event are factually and legally inapposite.[10]

John Deere contends *National Mutual Ins. Co. v. Liberty Mutual Ins. Co.*, 196 F.2d 597 (D.C. Cir. 1952), *cert. den.*, 344 U.S. 819 (1952) holds that the "then-required 'ICC endorsement' . . . did not modify the definition of 'insured' in the underlying policy." (Petition at page 20). John Deere is incorrect; *National Mutual* does not make that holding.

Instead, *National Mutual* holds that, **as between insurers**, the paramount policy of protecting injured

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[10] The most obvious flaw in John Deere's citation of these cases is that all of these cases were decided prior to 1980, and therefore **pre-date** the Motor Carrier Act of 1980. The MCS-90 Endorsement at issue is a product of the Motor Carrier Act of 1980 and therefore came into existence **after** all the cases cited by John Deere were decided. 49 C.F.R. § 387.15; see also MCS-90 Endorsement (Petition at App. E, page 40a).

members of the public is not implicated, and the limitations of their respective policies remain in effect in determining which insurer should bear the ultimate loss. *Id.* at 598, 600. This holding is in line with the law of multiple Circuits – that in disputes between insurers, one of which provides coverage under the policy and one of which provides coverage only because of the existence of the MCS-90 endorsement, the public policy considerations do not apply because the public is already protected by the insurer who provided the basic coverage. See, e.g., *Redlands Ins. Co. v. Shelter Mut. Ins. Co.*, 193 F.3d 1021, 1022 (8th Cir. 1999); *Adams, supra*, 99 F.3d at 969; *John Deere Ins. Co. v. Truckin' U.S.A*, 122 F.3d 270, 275 (5th Cir. 1997); *Canal, supra*, 889 F.2d at 610; *Travelers Ins. Co. v. Transport Ins. Co.*, 787 F.2d 1133, 1140 (7th Cir. 1985); *Allstate Ins. Co. v. Liberty Mut. Ins. Co.*, 368 F.2d 121, 125 (3rd Cir. 1976); Petition at App. A, pages 9a-11a.[11]

In *Adams* and this case, as observed above, injured members of the public are seeking compensation directly from the insurance carrier and have no recourse against any other policy. This is precisely the situation which puts the MCS-90 Endorsement and its expansion of the definition of "insured" into action. It is thereafter the insurer's burden to determine the ultimate allocation of the loss, which it can do by obtaining reimbursement from its insured. Since the primary goal of protection of the public was not at issue in *National Mutual*, that case is inapposite, both factually and legally, to the instant case.

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[11] The specific language of the MCS-90 Endorsement also reflects this understanding. (Petition at App. E, pages 42a-43a)

The same can be said of *Wellman v. Liberty Mutual Ins. Co.*, 496 F.2d 131 (8th Cir. 1974), which John Deere states "followed [*National Mutual's*] basic approach and reasoning." (Petition at page 21) *Wellman* does not even cite *National Mutual*, but if it did that citation would be without aid to John Deere's argument.

Wellman is inapposite for other reasons, as well. *Wellman* involved an accident which occurred when a vehicle, leased to Liberty Mutual's named insured and driven by the vehicle's owner/operator, struck and injured a third party. *Id.* at 133-134. After the District Court concluded Liberty Mutual's policy would provide coverage for the vehicle's owner/operator, the Eighth Circuit overturned the decision.

The Eighth Circuit construed then-applicable (1969) law and held that when a named insured lessee-motor carrier's ICC permit numbers were displayed on the lessor's vehicle, the owner/operator of the vehicle was operating it as a matter of law with the named insured lessee's permission. Accordingly, the Eighth Circuit found that since the driver of the named insured's vehicle was a permissive user, the driver was also an "insured" under the definition of that term within the Liberty Mutual policy. *Id.* at 136-137.

The Eighth Circuit then addressed an exclusion added to the policy by endorsement. The Eighth Circuit concluded that although there was an exception to the exclusion for "employees" of the named insured, and although the owner/operator would be deemed a "statutory employee" of the named insured (under ICC regulations) for liability purposes, he would not be classified as

an employee of the named insured for insurance purposes. Thus, the Eighth Circuit concluded the exclusion precluded coverage for the owner/operator additional "insured." *Id.* at 137.

As these facts show, *Wellman* **did not even involve the application or interpretation of an MCS-90 Endorsement** (or the BMC-90).[12] Indeed, nowhere in *Wellman* is the word "MCS-90" found.[13] The only "endorsement" the Eighth Circuit considered was an exclusionary endorsement attached to the policy. *Id.*

In fact, the *Wellman* court actually **invited** Congress to adopt an endorsement mandating coverage for permissive users of the named insured's vehicles, such as the MCS-90 Endorsement at issue. As the *Wellman* court stated:

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[12] This is despite Petitioner's erroneous assertion that *Wellman* dealt with "the liability of an insurer of an interstate motor carrier under the MCS-90", and that the injured party argued the effect of the "endorsement and regulations." (Petition at page 21-22)

[13] The *Wellman* court's examination of 1969 law extended only to the effect of 49 C.F.R. § 1057.4 [which had the effect of preventing a lessee motor carrier from immunizing itself from the negligence of drivers who operated their vehicles by claiming the drivers were "independent contractors," see, e.g., *White v. Excalibur Ins. Co.*, 599 F.2d 50 (5th Cir. 1979), *cert. den.*, 444 U.S. 965 (1979)], an ICC "regulation which in no way relates to or binds insurance companies." *Id.* at 139. This is in stark contrast to the MCS-90 Endorsement, and the regulations and code sections from whence it came (see, e.g., 49 C.F.R. § 387.15), **which directly operate to bind insurance companies**, requiring them to compensate injured members of the public when the situation dictates. *Wellman* is thus of no utility to Petitioner.

> We think it highly unfortunate that the ICC has not established a clearer requirement that motor vehicle common carriers' liability policies, filed pursuant to the Interstate Commerce Act, must extend coverage to the owner-operator of a leased vehicle to the same extent as that afforded the lessee-common carrier. Under such a requirement, insurance coverage would extend to cover the vehicle driver at all times. *Id.* at 139.

Accepting that invitation seven years later, Congress enacted the Motor Carrier Act of 1980, and the ICC promulgated 49 C.F.R. § 387.15, which requires the insurer to pay any final judgment against the "insured", as opposed to the "named insured", resulting from the negligent operation of the named insured's owned vehicles, thereby mandating coverage for permissive users.

Nor does *White, supra,* 599 F.2d 50, support John Deere's argument at all. Indeed, *White* is a *workers' compensation* case dealing with concepts utterly foreign to the instant case. *Id.* at 51. The Fifth Circuit Court of Appeals concluded that "motor carriers who are by federal law burdened with statutory employer liability for the acts of vehicle lessors are also entitled to the protection afforded employers by state law." *Id.* at 51.

In reaching this conclusion, the Fifth Circuit obliquely referenced then-existing federal statutory law pertaining to the liability of motor carriers arising out of the use of "motor vehicles not owned by them." *Id.* at 53, footnote 2, and 55. These statutes were enacted to prevent the lessee motor carrier from immunizing itself from the negligence of drivers who operated their vehicles by

claiming the drivers were "independent contractors." *Id.* at 52. The Fifth Circuit stated that, even if plaintiff had obtained a judgment against the named insured motor carrier, since the decedent was an employee of the motor carrier and not a member of the "public" for the purpose of these statutes, the public policy to protect the "public" was not invoked. *Id.* at 55.

Like *Wellman*, *White* does not involve the interpretation or application of an MCS-90 Endorsement or a BMC-90 Endorsement. Instead, *White* deals with statutory language applicable when the motor carrier ***does not*** own the motor vehicle at issue. In the case at bar, it is undisputed that at the time of the subject accident, Sahota was the owner of the trailer being operated by Sahota's permissive user. *White* is thus of no use to John Deere.

Nor does the last case cited by John Deere, *Carolina Casualty Ins. Co. v. Insurance Co. of North America*, 595 F.2d 128 (3rd Cir. 1979), support its argument.[14] Even a cursory review of *Carolina Casualty* reveals that it does not support John Deere's argument. Unlike the instant case, *Carolina Casualty* involved a dispute between two insurers, one insuring the motor carrier/lessee and the other insuring the lessor/owner and its driver. *Id.* at 130,

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[14] For some reason, John Deere cites this case for the proposition that the Third Circuit has joined "the majority" of courts "by indicating that federal law governing motor carriers does not require an insurer to pay judgments against parties other than its own insured." (Petition at page 24) It is incredible that John Deere would state that there are a "majority of courts" which so hold, yet it only cites *four* cases, all pre-dating the enactment of the Motor Carrier Act of 1980, to back up this blatantly erroneous assertion.

131. The issue presented was one of primary versus excess coverage. *Id.*

The issues presented in *Carolina Casualty* differ from the case at bar. As the authorities cited above show, the particular considerations and public policy behind the MCS-90 Endorsement's expansion of coverage to non-described vehicles do not apply to inter-insurer disputes. Even so, while interpreting the 1977 Interstate Commerce Act, the predecessor to the 1980 Motor Carrier Act at issue, the Third Circuit still chose to set forth its understanding that members of the public are meant to receive protection against the negligence of operators of ICC regulated vehicles as follows:

> We may assume without deciding, that if [the motor carrier] as the holder of the ICC permit, were the only available defendant in this case, it could not escape these significant duties of care and financial accountability to the public which the Federal Rules, and the contractual undertakings pursuant thereto, impose. We may also assume, without deciding, that INA, as [the named insured motor carrier's] certified liability insurer, could not absolve itself of a duty to make the initial payment of compensation to an injured member of the public, in the event that neither [the named insured motor carrier] **nor any other party involved** could answer financially for the damage. *Id.* at 137 (Bold added).

In other words, the Third Circuit *assumed* that the motor carrier's insurer would have to pay judgments obtained against the permissive users of the ICC regulated vehicles, whether they were the named insured motor carrier or not, in the event those parties could not

answer financially for the damage. That is exactly the case here: Sahota's permissive users who caused the subject accident, Blue Star and Garcha, cannot answer to LACMTA and Nueva in damages, and thus John Deere, as the liability insurer of the named insured motor carrier, must. Thus, both *Wellman, supra* and *Carolina Casualty, supra* actually support the decision of the Ninth Circuit in this case.

John Deere may cite in its reply brief (and Respondents are aware that these cases are cited in a motion for leave to file an amicus brief which may or may not be granted) *Radman v. Jones Motor Co., Inc.*, 914 F.Supp. 1193 (W.D. Pa. 1996), *aff'd*, 100 F.3d 948 (3rd Cir. 1996); *Pratt v. Andrews*, 518 N.E.2d 184 (Ill. Ct. App. 1987); *Nowak v. Transport Indem. Co.*, 358 N.W.2d 294 (Wis. Ct. App. 1984); and *Transport Indem. Co. v. Teter*, 575 S.W.2d 780 (Mo. Ct. App. 1978). None of these cases helps John Deere, if only for the fact that none of them is a Federal Circuit Court of Appeals case, and thus cannot create the "conflict" John Deere seeks to manufacture.

Radman did not deal with the interpretation of an MCS-90 Endorsement and the obligations it imposes upon insurers. Instead, *Radman* addressed the liability of a lessor for its lessee's accidents which occur while the lessee is using the lessee's owned vehicles. That is not the case here, where Sahota in fact was the owner of the Great Dane Trailer at issue, not Garcha or Blue Star. *Radman, supra*, 914 F.Supp. at 1195-1197, 1198-1202. Further, *Radman* cited *Wellman* and *Carolina Casualty, supra*, as persuasive authority for its decision. *Id.* at 1199-1201. These cases are distinguishable from the instant case, as is *Radman*.

Pratt also did not deal with the interpretation of the MCS-90 Endorsement or the obligations of an insurer under it. Instead, *Pratt* concerned a lessor's liability for not obtaining insurance on the lessee/vehicle owner's behalf. *Pratt, supra,* 518 N.E.2d at 184-185. That is not at issue in the instant case, and *Pratt* is of no utility to John Deere.

Transport Indemnity also did not construe the MCS-90 Endorsement, nor could it, inasmuch as that case was decided before the MCS-90 Endorsement was promulgated. Further, *Transport Indemnity* addressed the situation where a lessor is *automatically* vicariously liable under federal law for its lessee/driver/vehicle owner's liability. Thus, it was immaterial to that court to find that the insurance policy at issue covered the lessee/driver/owner, because the lessor was covered in any event and could respond in damages to injured members of the public. *Transport Indemnity, supra,* 575 S.W.2d at 785-786. Here, that is not the case.

Finally, *Nowak* is an inter-insurer dispute. *Nowak, supra,* 358 N.W.2d at 637. Thus, even if it obliquely addressed the MCS-90 Endorsement, which it does not, it has no application to the instant case.

In the final analysis, there is no conflict among the Circuits, despite John Deere's futile attempt to manufacture one. John Deere simply wants to avoid paying what it owes in this case. John Deere accepted two separate premiums from Sahota – one for the underlying policy and the other for the MCS-90 Endorsement. John Deere must now live up to its own contractual obligations. John Deere is the only insurer from whom Respondents, as

injured members of the public, can seek funds to compensate them for their severe injuries. If the Ninth Circuit's decision is overturned and John Deere is not held liable, despite all authority to the contrary, Respondents' injuries will go uncompensated. If that happens, the primary purpose behind the MCS-90 Endorsement – protection of the public – would be thwarted. John Deere must therefore pay any final judgments rendered against Blue Star and Garcha, as "insureds" under the John Deere policy pursuant to the MCS-90 Endorsement.

II. The Petition Should Be Denied Since Both The Express Language Of The John Deere Policy And The Plain Meaning Of The MCS-90 Endorsement Support The Ninth Circuit Ruling Below.

John Deere asserts that the issue presented by this case is "important and recurring." (Petition at page 26) John Deere further complains that the Ninth Circuit's decision is unfair "both to insurance companies and to the motor carriers that they insure," and "creates a series of perverse incentives that will expose insurers to liability without giving them the right or opportunity to defend the underlying claims." (Petition at page 26) These statements are disingenuous at best.

John Deere is hardly an uninformed party to a contract who now wishes to avoid the liability imposed by same. John Deere wrote its own policy to define "insured" to include not only its "named insured" but all those operating the named insured's owned vehicles with the named insured's permission and consent.

John Deere is also an insurer of truckers, having full knowledge that every policy it issued to a motor carrier regulated by the Motor Carrier Act of 1980 was required to contain an MCS-90 endorsement. John Deere knew that the MCS-90 endorsement expanded coverage to vehicles owned by its named insured regardless of whether or not said vehicles were specified in the policy. This is obvious, as there would be no point to the endorsement if it did not add this coverage to the policy. The premium charged for the Endorsement reflects knowledge that, regardless of whether or not a covered "auto" under the basic policy was involved, John Deere would have to pay judgments obtained by injured members of the public against the "insured" so long as the judgment resulted from the "operation, maintenance or use" of owned vehicles subject to ICC regulation.

Despite this knowledge, John Deere contends that Sahota is the only "insured" contemplated by the MCS-90 Endorsement, and that a judgment must first be entered against Sahota before it has any obligation to injured members of the public. John Deere thus contends that the Ninth Circuit's decision is "overbroad." (Petition at pages 13-19) John Deere is wrong.

The plain language of the MCS-90 Endorsement is to require the motor carrier's insurer to pay "any final judgments recovered against **the insured** for public liability. . . . " (Emphasis added). The Legislature did not use the phrases "named insured" or "motor carrier" in the required MCS-90 Endorsement or in the predecessor 1977 statute. Nor did it use the word "registrant" as in the statute enacted pursuant to the ICC Termination Act of 1995 (eff. 1996) (Petition at App. D, pages 36a-37a).

Indeed, the federal regulations show that the ICC knew how, and in what context, to use the words "motor carrier." (Petition at App. E, pages 38a-44a) Yet the words "insured" *and* "motor carrier" are used in the exemplar form MCS-90 Endorsement, and are not equated. 49 C.F.R. § 387.15 (Petition at App. E, pages 40a-43a) This indicates that the two terms do *not* mean the same thing under the regulations. Otherwise, the use of two terms to describe the same thing would be redundant, and regulatory language must be construed so as to avoid superfluity or redundancies. See, e.g., *Moskal v. United States*, 498 U.S. 103, 109-110 (1990); *Colautti v. Franklin*, 439 U.S. 379, 392 (1979).

Recognizing this legislative language and intent, both *Adams, supra*, and the Ninth Circuit decision in this case correctly interpret the MCS-90 Endorsement as providing coverage for permissive users of the named insured's owned vehicles – regardless of whether or not the named insured remembered to list all its owned vehicles on the declarations page. Any interpretation otherwise would frustrate the legislative intent and clear language of the MCS-90 Endorsement.

Contrary to John Deere's public policy/"fairness" argument that an insurer who is a stranger to the underlying action should not be held liable for judgments, it was no stranger here. John Deere was actively involved in the defense and indemnity of Sahota. It knew that defaults were being requested and then entered against Garcha and Blue Star. It *voluntarily* chose to do nothing. Thus, when John Deere implies it had no "right or opportunity to defend the underlying claims," John Deere is being less than forthright with this Court. (Petition at

page 26) John Deere could have defended both Garcha and Blue Star to prevent defaults being taken – John Deere chose to do nothing and should not be heard to complain.

Further, the Ninth Circuit's decision here, and the Tenth Circuit's in *Adams*, are fundamentally fair: as between the insurer and the motor carrier, the motor carrier *should* have the ultimate liability for accidents when it allows other persons to use regulated vehicles it owns without making sure that the permissive user has insurance. Indeed, that is the **very purpose** behind the reimbursement provision contained within the MCS-90 Endorsement. *Adams, supra*, 99 F.3d at 968; *Canal, supra*, 889 F.2d at 611.

John Deere further contends, based upon **unsubstantiated** figures regarding MCS-90 Endorsements issued, the number of vehicles they cover, and the number of trucking accidents in 1999,[15] [16] that "it is quite clear that the issue presented in this case will recur time and time again." (Petition at pages 27-28) The fact that there are only two cases dealing with the application of the MCS-90 Endorsement to the particular facts at issue here

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[15] A citation to the total number of tractor/trailer accidents in the United States in one year actually further supports the need for members of the public to be protected by the MCS-90 Endorsement language.

[16] John Deere also complains, with no support, that the Ninth Circuit's decision prompts drivers to enter into collusive default judgments with claimants, to the detriment of the insurers. To assert that actionable fraud and collusion would be the **likely** actions of uninsured drivers is not only unsupported, but ludicrous.

– the Tenth Circuit's in *Adams* and the Ninth Circuit's in this case, proves that statement wrong.

The answer as to why there are no other published decisions interpreting the MCS-90 Endorsement at issue is clear. The subject accident occurred on **November 24, 1995**. The accident in *Adams* occurred on **January 17, 1986**. Both accidents were governed by the Motor Carrier Act of 1980 and its applicable MCS-90 Endorsement required by the ICC. The Motor Carrier Act of 1980 was later superceded in 1996 by the enactment of the ICC Termination Act of 1995. Thus, there are no "current" accidents governed by the 1980 Motor Carrier Act, and there is no "urgency" created by the Ninth Circuit's decision below.

At any rate, whether there is one case or thousands dealing with these precise issues, the analysis does not change. MCS-90 Endorsements were created to eliminate the uncertainty as to which party would pay judgments, thereby securing an immediate source of funds for injured members of the public. See, e.g., *The Integral Ins. Co. v. Lawrence Fulbright Trucking, Inc.*, 930 F.2d 258, 261 (3rd Cir. 1991). Immediate compensation is thus the end, and the MCS-90 Endorsement is the means to that end. After compensation is secured, it is up to the liability insurer(s) and their insured(s) to allocate who is ultimately responsible for the loss. The injured members of the public, having obtained their compensation, are no longer in the fray. In other words, where an injured member of the public is involved, the purported hardship insurers and/or their named insureds face in allocating ultimate liability is beside the point.

In addition, federal law is quite clear that by requiring all insurance policies issued to interstate carriers to contain the MCS-90 Endorsement, the ICC prevents the possibility that, through inadvertence or otherwise, some of the motor carrier's owned vehicles may be uninsured, to the detriment of the public. *Adams, supra*, 99 F.3d at 968; *Canal, supra*, 889 F.2d at 611.

These principles are particularly applicable here. Sahota owned the Great Dane Trailer involved in the subject accident. The Great Dane Trailer was not specifically described under the basic John Deere policy. Respondents' damages and severe injuries therefore arose out of the use of one of Sahota's non-listed owned vehicles. The MCS-90 Endorsement comes into play by expanding coverage for vehicles owned by the named insured even though they may not be listed under the policy. The protection of the public is therefore served.

In sum, John Deere accepted premiums to provide the insurance at issue. It took those premiums knowing that Sahota could lend its vehicles to anyone in the United States, and that those persons might be "insureds" under the policy. It knew there was an MCS-90 Endorsement on the policy which by its very existence broadened coverage under the policy to include non-listed owned vehicles. Now John Deere is trying to extricate itself from the contractual obligations imposed by the MCS-90 Endorsement, and this should not be allowed to occur.

III. Even If There Was A Conflict Among The Circuits, The Supreme Court Could Decide This Case In Respondents' Favor Under California Law.

Even if there was a conflict among the Circuits, the Supreme Court could still decide the issues in favor of Respondents under California state law. Thus, John Deere's alleged "conflict" is not even sufficient cause to grant the Petition. See, e.g., *Sanson Hosiery Mills, Inc. v. NLRB*, 344 U.S. 863 (1952); *The Arlington, Inc. v. Mayer*, 339 U.S. 965 (1950).

California Insurance Code Section 11580.1 mandates that with respect to any owned vehicle for which there is coverage under an automobile liability policy issued after 1970, a person using such vehicle with the owner's permission is to be afforded insurance coverage under the owner's insurance policy to the same extent as the owner is afforded coverage. Cal. Ins. Code § 11580.1(b)(4). (Respondent's Appendix A, page **) In other words, such permissive users become insureds under the insurance policy pursuant to statute.[17]

Insurance Code Section 11580.1 applies to the John Deere policy since it is an automobile liability policy. Sahota owned the Trailer and Blue Star and Garcha were using it with Sahota's consent and permission. John Deere also admits that the MCS-90 Endorsement provides coverage for Sahota's liability arising out of the use of the Trailer.

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[17] This statutorily mandated "omnibus clause" takes the place of any conflicting omnibus clause set forth in the body of the policy itself. See, e.g., *General Insurance Co. of America v. Truck Ins. Exchange*, 242 Cal.App.2d 419, 422 (1966); *Glens Falls Ins. Co. v. Globe Indem. Co.*, 276 Cal.App.2d 643, 646 (1969).

Since Sahota receives this coverage, the permissive users must also receive this coverage, pursuant to Section 11580.1(b)(4). John Deere therefore has the duty to indemnify/pay final judgments rendered against Garcha and Blue Star.

Although this issue was fully presented and briefed to the Ninth Circuit, that Court declined to reach Respondents' state statutory claim since it decided the issues in Respondents' favor under federal law. (Petition at App. A, page 15a) Nevertheless, the state statutory claim remains a viable alternative basis for denying this writ.

CONCLUSION

For the foregoing reasons, Respondents respectfully request that this Honorable Court deny the Petition.

Respectfully submitted,

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Dated: April 25, 2001

APPENDIX A

STATUTORY PROVISIONS INVOLVED (NOT OTHERWISE CONTAINED IN PETITIONER'S APPENDIX)

California Insurance Code Section 11580.1

§ 11580.1. Motor vehicle insurance; Required provisions; Allowable exclusions; Volunteer services; Mexican nonadmitted insurers

(a) No policy of automobile liability insurance . . . covering liability arising out of the ownership, maintenance, or use of any motor vehicle shall be issued or delivered in this state on or after the effective date of this section unless it contains the provisions set forth in subdivision (b). . . .

(b) Every policy of automobile liability insurance to which subdivision (a) applies shall contain all of the following provisions:

(4) Provision affording insurance to the named insured with respect to any owned or leased motor vehicle covered by the policy, and to the same extent that insurance is afforded to the named insured, to any other person using the motor vehicle, provided the use is by the named insured or with his or her permission, express or implied, and within the scope of that permission. . . .

HISTORY: Added Stats 1970 ch 300 § 4. Amended Stats 1971 ch 1564 § 3, effective November 17, 1971; Stats 1974 ch 1409 § 2; Stats 1975 ch 194 § 1; Stats 1976 ch 1145 § 3; Stats 1979 ch 1173 § 1; Stats 1980 ch 1320 § 1, effective September 30, 1980; Stats 1981 ch 36 § 1; Stats 1982 ch 736 § 1, ch 1539 § 2; Stats 1983 ch 389 § 2; Stats 1987 ch 800

§ 3; Stats 1993 ch 408 § 1 (AB 575). Amended Stats 1999 ch 313 § 3 (SB 1296).

MOTION FILED
APR 25 2001

(4)

No. 00-1491

In the Supreme Court of the United States

JOHN DEERE INSURANCE COMPANY,
Petitioner,

v.

GUILLERMO NUEVA AND LOS ANGELES COUNTY METROPOLITAN TRANSPORTATION AUTHORITY,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MOTION FOR LEAVE TO FILE AN *AMICUS CURIAE* BRIEF IN SUPPORT OF PETITION BY JOHN DEERE INSURANCE COMPANY FOR A WRIT OF CERTIOIRARI

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IN THE SUPREME COURT OF THE UNITED STATES

John Deere Insurance Company,	)	
	)	
Petitioner,	)	No. 00-1491
	)	
v.	)	
	)	
Guillermo Nueva and Los Angeles County Metropolitan Transportation Authority,	)	
	)	
Respondents.	)	

MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Now comes the Trucking Industry Defense Association (hereinafter "TIDA"), by and through its counsel, Dickie, McCamey & Chilcote, P.C. and Michael F. Nerone, Esq., and for its Motion for Leave to File *Amicus Curiae* Brief in Support of Petition for Writ of Certiorari states as follows:

1. TIDA is an international organization comprised of in-house counsel, claims and risk management professionals at trucking and truck insurance companies. The trucking companies span from common carriers to private fleets. TIDA provides assistance to the trucking industry on various issues regarding personal injury, property damage, and workers' compensation claims.

2. TIDA became aware of the existence and substance of the above-captioned litigation and, pursuant to Rule 37(2) of the Supreme Court of the United States, immediately contacted counsel for Respondents in order to obtain consent to file the *Amicus Curiae* Brief in Support of the Petition for Writ of Certiorari by John Deere Insurance Company.

3. TIDA has a vested interest in the outcome of this litigation due to the potentially significant ramifications this decision will have upon the trucking industry as a whole.

4. The office of the undersigned immediately attempted to gain verbal consent from the Respondents in order to file the *amicus curiae* brief. Upon first contact with counsel for Respondents, verbal consent to file the *amicus curiae* brief was granted.

5. Subsequently, counsel for Respondents contacted the office of the undersigned withdrawing her previous verbal consent to file the *amicus curiae* brief.

6. Counsel for John Deere Insurance Company has consented to the filing of the *amicus curiae* brief on behalf of TIDA.

7. The undersigned submits that granting the motion for leave to file the *amicus curiae* brief will enable TIDA to bring to the attention of this Honorable Court relevant matter not already brought to its attention by the parties.

8. The *amicus curiae* brief in support of the Petition for Writ of Certiorari addresses public policy considerations invoked by the decision of the Ninth Circuit

Court of Appeals, as well as the practical effects of that decision within the trucking industry.

9. The *amicus curiae* brief in support of the Petition for Writ of Certiorari also addresses the diversion of opinions between the various Circuit Courts of Appeals and the effect this diversion has upon the trucking industry.

10. The undersigned submits that the filing of this Motion for Leave and the attached *Amicus Curiae* Brief in Support of the Petition for Writ of Certiorari by John Deere Insurance Company has been made within the time limitations for filing set forth in Rule 37(3).

Respectfully submitted,

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QUESTION PRESENTED

The question presented in the petition by John Deere Insurance Company is:

> Whether the Form MCS-90 endorsement requires an insurer to indemnify third parties not covered by the terms of the applicable policy, even where there is no "final judgment . . . against the insured" named in the insurer's policy.

CORPORATE DISCLOSURE STATEMENT

The Trucking Industry Defense Association (TIDA) is an international organization comprised of in-house counsel, claims and risk management professionals at trucking and truck insurance companies. The trucking companies span from common carriers to private fleets. TIDA provides assistance to the trucking industry on various issues regarding personal injury, property damage, and workers' compensation claims.

TIDA maintains a vested interest in the outcome of this litigation due to its potentially significant ramifications throughout the trucking industry.

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PETITION FOR A WRIT OF CERTIORARI

Amicus Curiae Trucking Industry Defense Association (TIDA), respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit in this case is reported at 229 F.3d 853 (9th Cir. 2000), and is reprinted in the Appendix to the Petitioner John Deere Insurance Company's Petition for a Writ of Certiorari ("App.") at App. 1a. The opinion of the United States District Court for the Central District of California (Baird, J.) is unreported and is reprinted at App. 16a of the Petition for a Writ of Certiorari by John Deere Insurance Company.

JURISDICTION

The opinion of the Court of Appeals was issued on September 20, 2000. A timely petition for rehearing and rehearing *en banc* was denied on December 26, 2000. App. 34a. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The ICC Termination Act of 1995 is codified at 49 U.S.C. §§13901-13908. Pertinent provisions are reprinted at App. 36a. The regulations promulgated thereunder are published at 49 C.F.R. §387.1 - .419. Pertinent provisions

are reprinted at App. 38a. The MCS-90 Endorsement, set forth at 49 C.F.R. §387.15, is reprinted at App. 39a.

STATEMENT OF THE CASE

Amicus Curiae, Trucking Industry Defense Association ("TIDA") is an international organization comprised of in-house counsel, claims and risk management professionals at trucking and trucking insurance companies. The trucking companies span from common carriers to private fleets. TIDA provides assistance to the trucking industry on various issues regarding safety, risk management, personal injury, property damage, and workers' compensation claims. TIDA has a vested interest in the outcome of this litigation due to the potentially significant ramifications this decision will have upon the industry as a whole.

TIDA hereby joins in the Statement of the Case previously set forth by John Deere Insurance Company in its Petition for a Writ of Certiorari in its entirety.

By way of further background, the trucking industry, as with the majority of national and worldwide industries, is comprised of large, medium, and small trucking companies, in addition to independent owner operators. Among the capital expenditures incurred by all trucking companies and independent owner operators are the purchases of the necessary equipment to engage in various activities within the trucking industry, such as intrastate and/or interstate freight transport. An integral part of any motor carrier operation is the implementation of adequate financial responsibility,, as mandated by federal law. All but the largest motor carriers satisfy their financial responsibility obligations through liability insurance coverage such as that obtained by Baljit Singh Sahota dba Sahota Trucking ("Sahota") from Petitioner

John Deere Insurance Company ("Deere") in the present matter.

Insurance companies calculate the premiums for trucking companies taking into account the MCS-90 Endorsement. The MCS-90 Endorsement requires insurers of motor carriers to make reimbursable indemnity payments up to the prescribed liability limits to satisfy judgments against those motor carriers. Up until the decision of the Ninth Circuit, trucking companies had been charged a premium for such insurance based upon the risk associated with a judgment being rendered against the insured trucking company. The amount of the premium is based upon a detailed history of the particular motor carriers' business operation, safety policies, evaluation of its drivers, as well as its loss history. The decision of the Ninth Circuit in this action effectively turns the trucking industry's underwriting analysis on its head by dramatically expanding the insurer's indemnity obligations to third parties who were not known nor contemplated when the premium was calculated.

The practical ramifications of the expanded scope of potential unknown/unanticipated insureds created by the Ninth Circuit's holding necessarily will result in increased premiums industry-wide to accommodate the expanded risks. Such increased premiums in an industry already burdened by high insurance costs and the recent dramatic increases in fuel costs will cause many smaller motor carriers to be unable to compete, will increase the costs of transporting freight and overall will have a significant negative impact, not only on the trucking industry, but also on the economy in general. As is made clear by the express language of the MCS-90 Endorsement and the pertinent federal regulations, this is neither the purpose nor the intent of the MCS-90 Endorsement.

In this action, a default judgment was rendered against Gurmukh Singh Garcha ("Garcha") and Blue Star Transportation ("Blue Star"), strangers to the Deere insurance policy. Significantly, no judgment has been rendered against Deere's insured, Sahota. Nonetheless, Respondents seek to impose an indemnity obligation for their default judgments against Garcha and Blue Star upon Deere. In reaching this outcome, the Ninth Circuit incorrectly employed the federally mandated MCS-90 Endorsement to rewrite the substantive terms and provisions of the Deere policy, despite the fact that the MCS-90 Endorsement did not conflict with the policy regarding the issue raised by Respondents.

Due to the nature of the trucking industry, this issue will consistently arise. This Honorable Court should therefore grant certiorari to review the opinion of the Ninth Circuit.

REASONS FOR GRANTING THE WRIT

I. THE MCS-90 ENDORSEMENT DOES NOT ALTER THE TERMS OF THE UNDERLYING POLICY OF INSURANCE AND IS NOT AVAILABLE FOR JUDGMENTS AGAINST A NON-INSURED.

As is set forth in 49 CFR §387.15, the MCS-90 Endorsement is separate and distinct from the underlying liability insurance policy. It only operates in circumstances where the terms of the underlying insurance policy would preclude an indemnity obligation which is required by the federal regulations set forth in 49 CFR §§387.1 - 387.17. Thus, the analysis of whether indemnity is owed for a

particular accident is two-fold. First, the language of the underlying policy must be reviewed to determine whether indemnity is owed. In this action, the Ninth Circuit correctly concluded that, pursuant to the language of the Deere policy, Deere has no indemnity obligation for the default judgment entered against Garcha and Blue Star.

Second, the language of the MCS-90 Endorsement, in conjunction with the related federal regulations, must be analyzed to determine whether indemnity is owed based upon the facts of the particular accident. It is respectfully submitted that neither the language of the MCS-90 Endorsement nor the related federal regulations mandate any indemnity obligation on behalf of Deere for the underlying accident. Although the language of the MCS-90 Endorsement expands the indemnity obligation with respect to non-scheduled vehicles, it does not in any manner alter or change the identity of those insured in the underlying insurance policy.

The definitions set forth in 49 C.F.R. §387.3 make clear that only the motor carrier named in the policy of insurance is an insured under the MCS-90 Endorsement. In this regard, the term "insured and principal" is defined in 49 C.F.R. §387.3 as,

> The motor carrier named in the policy of insurance, surety bond, endorsement, or notice of cancellation, and also the fiduciary of such motor carrier.

Id. Clearly the term "insured" for purposes of subpart 387.1-387.17 is the "motor carrier named in the policy of insurance . . . " When this definition is applied to the MCS-90 Endorsement, it is evident that no indemnity obligation to

non-insureds, such as Garcha and Blue Star, is owed under the MCS-90 Endorsement.

The Ninth Circuit's reasoning is flawed as it intermixes the unrelated concepts of "covered autos" and the determination of who is an insured. As stated above, Garcha and Blue Star fail to satisfy the requirements to be an insured under the policy, as well as the MCS-90 Endorsement. It is only by improperly rewriting the policy language that the Ninth Circuit reaches its conclusion. There is no language in the MCS-90 Endorsement nor in the related federal regulations that states or implies the policy language shall be altered, changed, or modified in any way. To the contrary, policy provisions which conflict with the indemnity obligations prescribed by the federal regulations are simply void and unenforceable.

Because the Ninth Circuit's holding is in direct conflict with the public policy expressed through the federal regulations and because that holding has such far reaching ramifications, this Honorable Court should grant certiorari.

II. THE DECISION BY THE NINTH CIRCUIT CONTRADICTS ITS PREVIOUS DECISION AND RATIONALE REGARDING THE MCS-90.

In its decision, the Ninth Circuit has expanded the definition of "insured" so as to permit the recovery of funds from an MCS-90 Endorsement when no judgment has been taken against the insured who purchased the policy, but rather, when only a default judgment exists against a non-insured. This rationale directly contradicts the previous rationale of the Ninth Circuit, as set forth in *Del Real v.*

United States Fire Ins. Crum & Forster, 64 F.Supp.2d 958 (E.D. Cal. 1998), *aff'd*, 188 F.3d 512 (9th Cir. 1999)(without published opinion). As can be seen, *Del Real* is factually similar to the case presently being considered.

In *Del Real*, the defendant insured a trucking company and truck leasing company which leased a trailer to Manke Trucking. Manke Trucking attached the leased trailer to its own tractor, which was operated by Gilbert Vidrios, a Manke Trucking employee. The Manke tractor and leased trailer were subsequently involved in a collision. The Estate of Del Real filed suit against Manke Trucking and Vidrios, and a consent judgment was entered. The estate then sought recovery from the defendant on the theory that the MCS-90 endorsement attached to the truck leasing company's policy required defendant to pay the judgment against Manke Trucking and Vidrios.

The Ninth Circuit, in disagreeing that the permissive users of the trailers invoke the MCS-90 endorsement stated:

> The language of the endorsement, the relevant federal regulations, and the interests of the parties all indicate that the term "insured" refers only to the named insured. In the MCS-90,
>
> > The insured agrees to reimburse the company for any payment made by the company on account of any accident, claim or suit involving a breach of the terms of the policy and for any payment that the company would not have been

> obligated to make under the provisions of the policy except for the agreement contained in this endorsement.
>
> It is unlikely that the term "insured" was intended to include lessors. Lessors are not parties to the insurance contract, and cannot be said to have knowingly entered into an agreement to reimburse the insurance company for payments made on the MCS-90 endorsement. The named insured cannot reasonably be understood to have agreed to reimburse the insurance company for payments made to judgment creditors of lessors. The relevant federal regulations reinforce the conclusion that only the named-insured is an "insured" under the endorsement; "insured and principal" are defined as "the motor carrier named in the policy of insurance, surety bond, endorsement, or notice of cancellation, and also the fiduciary of such motor carrier." 49 C.F.R. §387.5 (1994).

Del Real, 64 F. Supp. 2d at 964. In this factually identical case, the Ninth Circuit held the complete opposite and recognized that the MCS-90 does not alter the terms, conditions, and limitations of the policy. The Ninth Circuit also recognized that the language of the MCS-90 specifically requires that a judgment must be rendered against the insured prior to the invocation of the MCS-90 endorsement.

The decision of the Ninth Circuit presently under review, however, apparently ignored the rationale of *Del Real*, without addressing same. Due to the Ninth Circuit

ignoring its own prior rulings and rationale, the Petition for Writ of Certiorari should be granted.

III. THE DECISION BY THE NINTH CIRCUIT IS IN DIRECT CONFLICT WITH DECISIONS FROM OTHER CIRCUITS.

Not only does the Ninth Circuit obfuscate its prior rationale with respect to the obligations and scope of the MCS-90, but the decision by the Ninth Circuit directly conflicts with the precedents set forth in other Circuits.

In *Carolina Casualty Insurance Co. v. Insurance Co. of North America*, 595 F.2d 128, 139 (3d Cir. 1979), the Third Circuit Court of Appeals held that the BMC-90 Endorsement (predecessor to the MCS-90)[1] applied only to the named insured. In *Carolina*, Stanford was the owner of the tractor and was insured by Carolina. Refrigerated Transport Company, while insured by the Insurance Company of North America ("INA"), leased the tractor from Stanford. *Id.* at 130. Stanford provided a driver to Refrigerated Transport Co. in conjunction with the lease. The leased vehicle was involved in an accident while hauling cargo on behalf of Refrigerated Transport and while displaying the ICC placards of Refrigerated Transport. *Id.* at 129. The plaintiffs sued both Stanford and Refrigerated Transport, and the respective insurers filed separate declaratory judgment actions to determine coverage. *Id.* at 129-30.

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[1] The cases from the 1970s concern the "BMC-90" endorsement, while those since the early 1980s involve the successor form the MCS-90. *See Canal Ins. Co. v. First Gen'l Ins. Co.*, 889 F.2d 604, 611 (5th Cir. 1989).

In overturning the decision by the District Court and holding that the BMC-90 Endorsement attached to the INA policy imposed no obligations upon the INA (Refrigerate Transport's insurer) with respect to the permissive user Stanford, the Court reasoned:

> In the case before us, we find in particular that neither the federal motor carrier laws nor the (imputed) ICC endorsement nor paragraph 3 of Refrigerated's trip lease, transfer to Refrigerated the duties to defend claims properly brought against others or to pay judgments entered against others. 49 U.S.C. §315 (now 49 U.S.C. §10927) and 49 C.F.R. §1043.1(a), governing insurance and other assurances of motor carriers' financial responsibility, require only that the carrier give security 'to Pay any final judgment recovered against such motor carrier . . .; they mention nothing about defense of actions and nothing about payment of judgment recovered against the other parties such as lessors.

Id. at 139. Thus, INA was not responsible for any indemnity obligation on behalf of Stanford under the federal endorsement.

In *Wellman v. Liberty Mutual Ins. Co.*, 496 F.2d 131 (8th Cir. 1974), Liberty Mutual insured Morgan Drive-Away. Mitchell owned and operated the vehicle which had been leased to Morgan, and which displayed Morgan's ICC placards. *Id.* at 132. While operating the vehicle, Morgan was involved in an accident causing injury to Wellman. *Id.* Wellman commenced an action against Mitchell and Morgan. However, Morgan was dismissed from that action. *Id.* A

default judgment was taken against Mitchell, the owner-operator, and Wellman then attempted to collect from Liberty Mutual. *Id.*

The Eighth Circuit held that Mitchell was not covered under the Liberty Mutual policy, nor by the I.C.C. Endorsement:

> The relevant I.C.C. regulation on insurance, 49 C.F.R. §1043, contains no provision which would require a motor carrier specifically to carry insurance affording liability coverage for judgments rendered solely against an owner-operator of a vehicle leased to the motor carrier.

Id. at 138. Because no judgment was entered against Morgan, the I.C.C. Endorsement did not impose any indemnity obligation upon Liberty Mutual for the judgment against non-insured owner operator:

> Had the Wellmans obtained a state court judgment against Morgan, the result in this case would have been different, for the insurance policy would clearly have covered Morgan as the 'named insured' even though its liability would be vicarious and statutorily derived.

Id. at 139.

Similarly, in the present matter, the Respondents have taken a default judgment against the non-insured and now seek to impose an indemnity obligation under the MCS-90

Endorsement. Despite the fact that no judgment has been entered against the insured.

The diversion in opinion between the Third, Eighth and Ninth Circuits is readily apparent. In addition, other circuits have adopted the same rationale as the Third and Eighth Circuits, in direct conflict with the Ninth Circuit's decision in this case. *See White v. Excalibur Ins. Co.*, 599 F.2d 50, 55 (5th Cir. Cert.1979), *cert. denied*, 444 U.S. 965 (1979) (holding plaintiff could recover from the insurer under federal law only if she had obtained a judgment against the carrier Superior); *Nowak v. Transport Indem. Co.*, 120 Wis. 2d 635, 358 N.W. 2d 294, 296 (Wis. Ct. App. 1984) (holding a "final judgment recovered against the insured" refers only to a judgment entered against a named insured motor carrier); *Transport Indem. Co. v. Teter*, 575 S.W.2d 780, 785 (Mo. Ct. App. 1978) (rejecting the argument that the federal endorsement should be read in conjunction with the "Who Is An Insured" clause of the policy; rather, the endorsement stands on its own and is triggered only by a judgment against the named insured).

Similar to the cases cited above, a judgment has not been rendered against Deere's insured, Sahota. As these cases have held, the MCS-90 Endorsement is not applicable unless a judgment has been rendered against the named insured. Because the Ninth Circuit ignored the precedent of other Circuit Courts and ignored its own prior holding, certiorari should be granted.

IV. PUBLIC POLICY CONSIDERATIONS REQUIRE THAT THE NINTH CIRCUIT'S DECISION BE REVIEWED.

Common to all motor carriers are the acquisition costs of the tractor(s) and/or trailer(s). Also common to all legal motor carriers is the cost of liability insurance. Such insurance is one of the single most costly expenditures for many motor carriers.

Like other forms of insurance, liability insurance is based upon a calculation of risk. Of paramount importance in this analysis is the amount of risk as determined by the policy's monetary limits of liability, as well as the scope of risk as determined by numerous factors associated with the manner in which the insured operates. Among these factors, the insurers take into account the risk exposure created by the MCS-90 Endorsement. Creation of an indemnity obligation such as that effectuated by the Ninth Circuit's decision in the present matter, with the attendant additional risk for the conduct and activities of non-insureds whose business operation, safety policies, drivers, and loss history were completely unknown, dramatically distorts the accepted underwriting analysis. It effectively prevents an insurer from ever performing an accurate and comprehensive projection of risk. This is so because there are literally an infinite number of potential persons or entities who the insurer could be obligated to indemnify under the Ninth Circuit's holding. Clearly, as is set forth more fully above, this infinite scope of risk was not intended nor mandated by the applicable federal regulations.

The cost of insurance is passed on to the consumer in the form of higher transportation fees, and subsequent higher

prices to the consumers. Small and medium sized trucking companies, and on occasion even large trucking companies, however, encounter the difficulty of paying the initial premiums and then attempting to efficiently pass on the costs of this insurance. In many cases, the cost of the insurance is too great and the efficient transfer of these costs does not occur, resulting in the failure of the particular trucking company. Thus, the Ninth Circuit's decision works a manifest injustice upon the industry as a whole, as well as the economy in general.

Further, because indemnity payments made under the MCS-90 Endorsement are reimbursable, the Ninth Circuit's decision works an injustice on the named insured. In this case, a default judgment entered against non-insureds, Garcha and Blue Star, will result in the ultimate loss potentially being borne by the named insured, Sahota. Despite the fact that Sahota lacked the right and ability to defend or oppose the judgment and the fact that Sahota's conduct played no causal role in the occurrence of the accident, it will ultimately pay pursuant to the MCS-90 Endorsement. Such an anomaly and injustice is contrary to the scheme of mandatory insurance required by the federal regulations. Garcha and Blue Star were required to maintain adequate financial responsibility. If they failed to do so, it is inherently unjust to shift the responsibility for their conduct to parties who had only a single business transaction with them which was unrelated to the accident.

It is respectfully submitted that this case presents a compelling question previously unaddressed by this Honorable Court that has wide reaching public ramifications. Thus, certiorari should be granted so that the Ninth Circuit's decision can be reviewed and reconciled with the conflicting

authorities of the other Circuits and the plain language of the pertinent federal regulations.

CONCLUSION

Based upon the foregoing facts, authorities and arguments, it is respectfully submitted that the Petition for Writ of Certiorari by John Deere Insurance Company should be granted.

Respectfully submitted,

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IN THE

Supreme Court of the United States

JOHN DEERE INSURANCE COMPANY,
Petitioner,

v.

GUILLERMO NUEVA & LOS ANGELES COUNTY METROPOLITAN TRANSPORTATION AUTHORITY,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

The regulatory scheme at issue in this case is straightforward and has existed without significant change since at least 1935. But, like the Courts of Appeals for the Ninth and Tenth Circuits before them, respondents have misconstrued the text of the Form MCS-90 Endorsement (the "MCS-90"), disregarded the statutory and regulatory framework in which it operates, and ignored its history. Respondents also appear to think that the MCS-90 was the first endorsement of its kind, and that it first appeared in 1982 and then vanished with the repeal of the Motor Carrier Act of 1980 ("MCA"), in 1996. Respondents are wrong.

As a result of these basic errors, respondents do not perceive—or choose to ignore—the profound division between the Ninth and Tenth Circuits, on one hand, and the D.C., Third, Fifth, and Eighth Circuits, on the other. The latter group has made clear that federal law requires only that insurers of interstate motor carriers pay judgments entered against the motor carriers named in their policies. In conflict with these courts, and with the language of the relevant statutes and regulations (and the MCS-90 itself), the Ninth and Tenth Circuits have held that the MCS-90 changes the terms of policies to which it applies, requiring an insurer to pay a judgment against a party who is not covered by its policy, even without a judgment against its insured motor carrier.

Although the cases cited in the petition involve various iterations of the relevant statutes, regulations, and endorsements, the relevant aspects of the regulatory scheme are unchanged and remain in effect to this day. Thus, respondents err in suggesting that prior case law does not indicate a conflict among the circuits, and that the question presented is no longer meaningful. The factual distinctions emphasized by respondents do not obscure the disagreement among the courts, and the erroneous suggestion that the MCS-90 is no longer in effect cannot diminish the importance of this issue.

1. Respondents' arguments that the decision below does not conflict with rulings of other circuits are unconvincing.

a. Respondents claim that cases decided prior to the enactment of the MCA and the promulgation of the MCS-90 cannot give rise to a conflict with cases that interpret the MCS-90. *See* Resp. Br. at 14 & n.10, 22. This argument ignores the fact that, since 1935, the statutory and regulatory scheme has not changed in any way material to this case. Throughout that time, federal law has required motor carriers to obtain insurance to pay judgments against them for negligence in the operation of their vehicles, and has implemented that requirement through an identically worded endorsement, now known as the MCS-90. *See* Pet. at 14-15.

The BMC-90 endorsement (the predecessor of the MCS-90) was drafted "in the form required by Sec. 215 of Part II of the Interstate Commerce Act . . ., and orders of the Interstate Commerce Commission of March 25, 1940 and April 4, 1940. . . ." *Commercial Standard Ins. Co. v. Robertson*, 159 F.2d 405, 406 (6th Cir. 1947). Developed by the Department of Transportation ("DOT") in response to the MCA, the MCS-90 was adopted by the Interstate Commerce Commission ("ICC") in 1982 under its rulemaking authority under the MCA, to "reconcile the administrative differences in the insurance programs of [the ICC] and the [DOT]." *Motor Carriers of Property Minimum Amounts of Bodily Injury and Property Damage Liab. Ins. (49 CFR Parts 1003 and 1043)*, 132 M.C.C. 948, 948 (1982). The MCS-90 differed from the BMC-90 by requiring coverage for environmental restoration, as well as bodily injury and property damage, by including a schedule of limits, and stating that it is the motor carrier's obligation to satisfy the financial responsibility requirement. *Id.* at 952. But in all relevant respects, the BMC-90 in use before 1980 was identical to the MCS-90.

Courts have thus treated the BMC-90 and the MCS-90 as interchangeable, and have naturally used precedents involv-

ing the former to interpret the latter. For example, in a case involving a 1984 accident, the court relied on three cases from the early 1970s, and disagreed with several cases that predated the MCS-90. *See Empire Fire & Marine Ins. Co. v. Guaranty Nat'l Ins. Co.*, 868 F.2d 357 (10th Cir. 1989). The court took for granted that pre-1980 cases provided applicable precedents. *See also Canal Ins. Co. v. First Gen. Ins. Co.*, 889 F.2d 604, 611 (5th Cir. 1989) (describing the MCS-90 and BMC-90 as "identical in relevant part"). Changes in the names of the law, regulations, and endorsements are irrelevant. The substance of the provisions is identical, and the disagreement among the courts is substantial.

b. Respondents identify various factual distinctions that purportedly eliminate any conflict between the cases cited in the petition and the Ninth Circuit's decision. But these trivial differences cannot obscure a fundamental disagreement between the circuits. The Ninth and Tenth Circuits have held that the MCS-90 amends an insurance policy to which it applies, requiring the insurer to pay judgments entered against parties not covered by the base policy, even in the absence of a judgment against the named insured. The cases cited in the petition flatly conflict with that holding.[1]

In *National Mutual Insurance Co. v. Liberty Mutual Insurance Co.*, 196 F.2d 597, 600 (D.C. Cir.), *cert. denied*, 344 U.S. 819 (1952), the court held that the ICC endorsement, "doubtless would have enured to the benefit of [the victim], had she chosen to sue [the motor carrier]," but that it did not "shift the [owner-operator's] liability [to the motor carrier's insurer]" or "make [the owner-operator] an 'insured' under the [motor carrier's] policy." Thus, the court made clear

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[1] Though respondents criticize the petition for claiming that a majority of courts have rejected the Ninth Circuit's position, *see* Resp. Br. at 19 n.14, a clear majority (4 of 6) of the courts of appeals that have considered the issue have held that an insurer is liable under federal law only for judgments against its named insured motor carrier.

that the endorsement and underlying regulatory scheme do not alter the terms of existing insurance policies or require payment in the absence of a judgment against the named insured. Though the court noted that the "ICC endorsement" was required for the protection of the public, it never suggested that the meaning of the word "insured" would have differed had the case involved a member of the public rather than two insurers, and there is no basis in the statute, regulations, or the endorsement for this distinction. Respondents' effort to minimize the conflict is therefore unconvincing.[2]

Respondents' attempts to distinguish *Wellman v. Liberty Mutual Insurance Co.*, 496 F.2d 131 (8th Cir. 1974), are no more fruitful. After sustaining injuries in an accident with a vehicle driven by its owner and leased to an ICC-approved motor carrier, plaintiffs obtained a default judgment against the owner-operator, but not the motor carrier. Plaintiffs then sought to satisfy that judgment from proceeds of the motor carrier's insurance policy. Although the court held that the owner-operator was not an "insured" under that policy, plaintiffs argued that because one applicable regulation, 49

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[2] Respondents are also quite wrong to suggest that the Tenth Circuit agrees with other circuits that the MCS-90 has no application in disputes between insurers. *See* Resp. Br. at 15. In fact, there is a longstanding conflict on this very point. While the Tenth Circuit holds that the MCS-90 converts the policy to which applies into a primary policy, *see Empire Fire & Marine Ins. Co. v. Guaranty National Ins. Co.*, 868 F.2d 357, 363 (10th Cir.1989); most others hold that it has no effect on the base policy. *See Canal Ins. Co.*, 889 F.2d at 611; *see also* Harold A. Weston, Annotation, *Effect of Motor Carrier Provisions on Insurance and Indemnity Agreements (49 U.S.C.A. § 13906, 14101) in Allocating Losses Involving Interstate Motor Carriers*, 157 A.L.R. Fed. 549, § 6 (1999) (noting division of authority and the Tenth Circuit's "'minority' view that the MCS-90 makes the policy primary"). The Tenth Circuit's approach in both contexts appears to flow from its understanding that the terms of the MCS-90 and the terms of related insurance policies are not independent, and that the meaning of one influences the other. By granting review of this case, the Court could also address this related disagreement about the effect of the MCS-90 in disputes between insurers.

C.F.R. § 1057.4, required the motor carrier to take responsibility for vehicles and equipment used in its business, its insurance policy necessarily covered judgments against persons operating those vehicles.

The Eighth Circuit rejected this contention, holding that the applicable law and regulations did not require the insurer "to pay a judgment for others who are not mentioned in the I.C.C. insurance regulation (49 C.F.R. § 1043.1), and who are specifically excluded by the language of the policy." *Id.* at 139. As this passage makes clear, the court's ruling did not "extend[] only to the effect of 49 C.F.R. § 1057.4." Resp. Br. at 17 n.13. Rather, the court explicitly relied on the "relevant I.C.C. regulation on insurance, 49 C.F.R. § 1043," and held that it "contains no provision which would require a motor carrier specifically to carry insurance affording liability coverage for judgments rendered solely against an owner-operator." 496 F.2d at 138. That provision, quoted by the court, is identical in all relevant respects to the regulation in force today. *Compare id.* at 138 n.8 *with* 49 C.F.R. § 387.301, Pet. App. at 43a-44a. Section 1043, moreover, specifically provided that insurance endorsements had to be "in the form prescribed and approved by the ICC." 49 C.F.R. 1043.7 (1978). Thus, contrary to respondents' claim, *Wellman* did address the predecessor of the MCS-90, and held that it did not require coverage for judgments entered only against third parties. In short, *Wellman* is legally and factually indistinguishable from the Ninth Circuit's decision, and stands in direct conflict with it.

In *White v. Excalibur Ins. Co.*, 599 F.2d 50, 55 (5th Cir. 1979), the court held that "in order for [the insurance company] to be liable under the policy filed by [its insured motor carrier] with the ICC, [the motor carrier] must first be adjudicated liable as a party." Though this ruling flatly contradicts the decision below, respondents argue that *White* dealt only with workers' compensation, and is therefore inapplica-

ble. But the *White* addressed two separate issues. The court first held that the state workers' compensation scheme prevented recovery under state tort law, then turned to a separate federal claim against the insurer. In conflict with the Ninth Circuit, the court held that the plaintiff could recover from the insurer under federal law only if it obtained a judgment against the carrier.

Respondents point out that the court also noted that the plaintiff could not recover because the injured party was not an "intended beneficiary" of the federal law. But the central basis for the court's decision was the absence of a judgment against the insured motor carrier. In any event, this Court has long held that an alternative holding is binding precedent that establishes a conflict between circuit court decisions. *See Woods v. Interstate Realty Co.*, 337 U.S. 535, 537 (1949). Respondents also claim that *White* is irrelevant because it "deals with statutory language applicable when the motor carrier does not own the motor vehicle at issue." Resp. Br. at 19. But the Fifth Circuit explicitly ruled on the basis of 49 U.S.C. § 315, the nearly identical predecessor of 49 U.S.C. § 13906. Both of these statutes refer to the obligations of a "motor carrier," without drawing any distinction between owned and leased vehicles.

In *Carolina Casualty Insurance Co. v. Insurance Co. of North America*, 595 F.2d 128, 136-39 (3d Cir. 1979), the court thoroughly examined the BMC-90 endorsement and the statute and regulations that it implemented. In conflict with the Ninth Circuit, the court concluded that "49 U.S.C. § 315 and 49 C.F.R. § 1043.1(a) . . . require only that the [motor] carrier give security to pay any final judgment required against *such motor carrier*; they mention nothing about defense of actions and nothing about payment of judgments recovered against the other parties such as lessors." *Id.* at 139 (emphasis in original).

Respondents urge the court to disregard this fundamental difference on the ground that *Carolina Casualty* involved a dispute between insurers, but offers no principled explanation why this factual distinction provides a basis for doing so. Respondents also emphasize that the court assumed, without deciding, that the insurer of a regulated motor carrier would have to compensate an injured member of the public, if neither the motor carrier nor another party could do so. Resp. Br. at 20-21.[3] But respondents ignore the court's prior assumption in this hypothetical – that the insured motor carrier is "the only available defendant in this case." 595 F.2d at 137. Thus, even the court's dictum makes clear that in order for the insurer to be held liable, there must be a judgment against its insured motor carrier.

2. As to the merits, respondents' structural and "plain language" arguments are insubstantial or flatly incorrect. First, our interpretation of the MCS-90 does not deprive it of all effect. Resp. Br. at 1 n.1, 24.[4] Like respondents and the Ninth Circuit, we believe that the MCS-90 protects the public by requiring insurers to pay judgments when underlying policies would not require them to do so. Though our understanding of the MCS-90 differs in that we believe that an injured party must obtain a judgment against the insured motor carrier to obtain this protection, it in no way deprives the MCS-90 of all meaning.

Second, respondents argue that the term "insured" in the MCS-90 cannot refer only to the named insured motor carrier. They say that if the "legislature" had wished to limit the

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[3] Respondents try to bring themselves within this hypothetical rule by claiming that Garcha and Blue Star had no insurance. *See also* Resp. Br. at 3, 15. But the courts below did not make or rely upon such a finding, which has no support in the record.

[4] Nor does this interpretation seek to avoid contractual risks that Petitioner knowingly assumed. Contrary to respondents' assertions, Resp. Br. at 4, 23, petitioner did not agree to insure permissive users of all of Sahota's vehicles; rather, it assumed responsibility for all *listed* vehicles.

MCS-90 in this way, it would have used the term "motor carrier" or "named insured." Resp. Br. at 24. But Congress in fact did use the former term when creating the regulatory requirement that the MCS-90 implements. And the overall structure of the BMC-90 and MCS-90 indicate that the ICC and the DOT intended "insured" to refer only to the named insured motor carrier. Pet. at 17-18. For example, the endorsements provide that cancellation "may be effected by the company or the insured." As it would be nonsensical to give third parties a right to cancel, the term can only refer to the named insured. Respondents' argument that the MCS-90 makes a distinction between "motor carrier" and "insured" is simply wrong. The MCS-90 seeks "to assure compliance *by the insured*, within the limits stated herein, *as a motor carrier of property*, with . . . the Motor Carrier Act." Pet. App. at 42a (emphasis added). On its very face, the MCS-90 *equates* the two terms, rather than distinguishing them. Finally, even if the term "insured" could be read to include additional insureds, it would not support respondents' "textual" argument. Given the unchallenged finding that respondents are not "insureds" under the policy, the MCS-90 can permit recovery from petitioner only by altering the policy terms. There is no textual justification for this transformation.

3. Respondents suggest that the issue presented here is not sufficiently important to merit this Court's review. Respondents say that only two cases deal with the application of the MCS-90 to the facts at issue here, Resp. Br. at 26, and imply that the ICC Termination Act of 1995 rendered the MCS-90 inapplicable to accidents occurring after 1995, *id.* at 27. Again, respondents are wrong. The question presented by this petition arises often, and will continue to do so.

Beyond the two cases cited by respondents, many recent federal and state decisions involve efforts by injured parties to recover from insurers of motor carriers without first obtaining judgments against the motor carriers. A small sam-

pling of these cases shows that this problem recurs, and that most courts reject the Ninth Circuit's approach. *See, e.g.*, *Wellman*, 496 F.2d at 131; *Del Real v. United States Fire Ins. Crum & Forster*, 64 F. Supp. 2d 958, 964 (E.D. Cal 1998) (holding that injured party could not recover from motor carrier's insurer for judgment entered only against motor carrier's lessees); *Progressive County Mut. Ins. Co. v. Carway*, 951 S.W.2d 108, 114 (Texas Ct. App. 1997) (holding that injured party who obtained default judgment against driver, but not motor carrier, could not recover from insurer under the MCS-90); *Lynch v. Yob*, No. 99-T-0065, 2000 WL 1804349, at *3-*4 (Ohio App. Dec. 8, 2000) (holding that MCS-90 did not authorize recovery from insurer because none of the defendants was a "named insured" in the underlying policy); *Transport Indem. Co. v. Teter*, 575 S.W.2d 780 (Mo. Ct. App. 1978) (holding that insurer was not liable under BMC-90 because the driver of the vehicle was not an insured under the base policy). There are also many reported cases of injured parties obtaining judgments against both insured motor carriers and drivers. *See, e.g.*, *T.H.E. Ins. Co. v. Larsen Intermodal Servs.*, 242 F.3d 667, 672 (5th Cir. 2001) ("[T]he injured plaintiffs filed their petitions against Larsen [the motor carrier, its driver, and T.H.E. in state court"). If this Court allows the Ninth Circuit's erroneous decision to stand, injured parties are likely to dispense with suits against the motor carriers named in the insurance policies.[5]

Second, respondents' suggestion that the ICC Termination Act of 1995 did away with the MCS-90 is wrong. As

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[5] *Wellman* shows why parties will choose this path. By obtaining a default judgment against the driver, avoiding the motor carrier, and then suing the insurer, the plaintiff avoided the "most difficult task of establishing legal liability against [the motor carrier]" in the face of a police accident report finding the plaintiff at fault. 496 F.2d at 139 n.10. Thus, it is scarcely "ludicrous," Resp. Br. at 26 n.16, to assume that plaintiffs will use the Ninth Circuit's rule strategically to overcome flaws in their cases.

the Ninth Circuit noted below, the abolition of the ICC did not affect existing regulations: "the old ICC regulations remain in effect until the new regulations are promulgated." Pet. App. at 6a n.3. The DOT has not promulgated new regulations, and the MCS-90 endorsement and related regulations remain intact at 49 C.F.R. § 387. As the relevant language of the ICC Termination Act, *see* Pet. App. at 37a, is identical in all relevant respects to the prior statutory language, there is no reason to think that the DOT will suddenly repeal the MCS-90. Thus, the proper interpretation of this endorsement is a matter of continuing importance.

4. In the end, respondents fall back on the shopworn tactic of presenting this Court with a state-law argument they would assert on remand if the Court were to rule for petitioner. But such an argument provides no basis for denying review. This petition presents an important and recurring question of federal law, regardless of the alternative state-law theories that respondents may later assert.

In any event, respondents could not prevail under California law, which does not require petitioner to provide coverage for Garcha and Blue Star. Under section 11580.1(b)(4) of the California Insurance Code, a policy that provides insurance to the named insured "with respect to any owned or leased motor vehicle covered by the policy" must also provide coverage to a permissive user of the vehicle "to the same extent that insurance is afforded to the named insured." It is undisputed, however, that Sahota's trailer was not listed on the John Deere policy. As a result, that policy did not "cover" Sahota's unlisted trailer, and did not afford Sahota any insurance with respect to it. Thus, section 11580.1 provides no coverage for permissive users of the trailer, and no basis for respondents to oppose review.

CONCLUSION

For the foregoing reasons, and for the reasons previously stated, the petition should be granted.

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In the Supreme Court of the United States

JOHN DEERE INSURANCE COMPANY, PETITIONER

v.

GUILLERMO NUEVA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

Whether an endorsement required by federal law on insurance policies issued to commercial motor carriers requires the insurer to pay, in the first instance, a judgment for damages inflicted on a member of the public through an authorized third party's negligent use of a vehicle owned by the carrier but not covered by its policy, where the injured party has obtained a judgment against the third-party user, but not against the motor carrier itself.

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This brief is submitted in response to the Court's order inviting the Solicitor General to express the views of the United States.

STATEMENT

1. The Secretary of Transportation has regulatory authority over the transportation of goods or passengers by commercial motor carriers in interstate or foreign commerce, subject to various exemptions set out in succeeding provisions. 49 U.S.C. 13501, 13502-13508 (Supp. V 1999) (exemptions).[1] Section 13901 provides that a person may

[1] The provisions of Subtitle IV of Title 49 were generally revised by the ICC Termination Act of 1995 (ICC Termination Act), Pub. L. No. 104-88, 109 Stat. 803. Relevant portions of Title 49 were revised, codified, and enacted into positive law by the Act of July 5, 1994, Pub. L. No. 103-272, 108 Stat. 745. Unless otherwise indicated, all citations in this brief to provisions of the United States Code are to the 1994 edition as modified by the 1999 Supplement (Supp. V).

provide transportation subject to the Secretary's jurisdiction only if registered to do so. Section 13902 sets out requirements for registration, including that the registrant be "willing and able to comply with * * * the minimum financial responsibility requirements established by the Secretary pursuant to section[] 13906[.]" 49 U.S.C. 13902(a)(1).

Section 13906 requires in pertinent part:

> The Secretary may register a motor carrier under section 13902 only if the registrant files with the Secretary a bond, insurance policy, or other type of security approved by the Secretary, in an amount not less than such amount as the Secretary prescribes pursuant to, or as is required by, sections 31138 [relating to carriers transporting passengers] and 31139 [relating to carriers transporting property * * *. The security must be sufficient to pay, not more than the amount of the security, for each final judgment against the registrant for bodily injury to, or death of, an individual resulting from the negligent operation, maintenance, or use of motor vehicles, or for loss or damage to property (except [cargo] * * *), or both.

49 U.S.C. 13906(a)(1). That requirement is restated in an applicable regulation, 49 C.F.R. 387.301 (set out at Pet. App. 43a-44a), which provides in part:

> No common or contract [motor] carrier * * * shall engage in interstate or foreign commerce * * * unless and until there shall have been filed with and accepted by the FMCSA [Federal Motor Carrier Safety Administration] * * * certificates of insurance * * * or other securities or agreements, in the amounts prescribed in § 387.303, conditioned to pay any final judgment recovered against such motor carrier for bodily injuries to or the death of any person resulting from the negligent operation, maintenance or use of motor vehicles in

> transportation subject to Subtitle IV, part B, chapter 135 of title 49 of the U.S. Code, or for loss of or damage to property of others[.]

49 C.F.R. 387.301(a)(1), as amended by 66 Fed. Reg. 49,873 (effective Oct. 1, 2001).[2] Section 13906 specifies that the Secretary "may determine the type and amount of security filed" in satisfaction of its requirements, and that he "shall * * * prescribe the appropriate form of endorsement to be appended to policies of insurance and surety bonds which will subject the insurance policy or surety bond to the full security limits of the coverage required under this section." 49 U.S.C. 13906(d) and (f).

Section 31139 of Title 49, to which Section 13906 refers, generally requires the Secretary to "prescribe regulations to require minimum levels of financial responsibility" for all motor carriers transporting property for hire in interstate or foreign commerce. See 49 U.S.C. 31139(b). The financial responsibility requirements apply to any carrier using a vehicle with a gross weight of at least 10,000 pounds, even if

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[2] Section 387.301 was originally promulgated by the Interstate Commerce Commission, and was formerly set out at 49 C.F.R. 1043.1 (1995). When Congress abolished the ICC in 1995, it provided that "[a]ll * * * regulations * * * issued" by the ICC in performing functions transferred to the Secretary of Transportation "shall continue in effect according to their terms until modified, terminated, superseded, set aside, or revoked in accordance with law." ICC Termination Act, Pub. L. No. 104-88, § 204(a), 109 Stat. 941, (49 U.S.C. 701 note 2); see also ICC Termination Act, § 205, 109 Stat. 943. The regulation was redesignated as 49 C.F.R. 387.301 in 1996. See 61 Fed. Reg. 54,706, 54,709. The Motor Carrier Safety Improvement Act of 1999, Pub. L. No. 106-159, 113 Stat. 1748, created the Federal Motor Carrier Safety Administration (FMCSA) within the Department of Transportation, and charged it with carrying out "duties and powers related to motor carriers or motor carrier safety vested in the Secretary" by various provisions of Title 49, including chapters 133-149 and 311. See 49 U.S.C. 113(a) and (f)(1); 49 C.F.R. 1.73(a) and (f).

the carrier or its business otherwise comes within an exemption from the regulatory jurisdiction conferred on the Secretary by Section 13501, and therefore from Section 13901's registration requirement. 49 U.S.C. 31139(b) and (g).[3] The carrier must have insurance (including qualified self-insurance) or other adequate security "sufficient to satisfy liability amounts established by the Secretary," but not less than $750,000, "covering public liability, property damage, and environmental restoration."[4]

The Secretary's regulations establish a basic coverage requirement of at least $750,000. 49 C.F.R. 387.7(a), 387.9. They also prescribe a specific form of endorsement—Form MCS-90—that must be included in any insurance policy in order to satisfy the financial responsibility requirements of Section 31139. 49 C.F.R. 387.7(b)(3) and (d), 387.15 (Illus. I) (as amended by 66 Fed. Reg. at 49,873). The same form of endorsement is used to satisfy the registration requirement under Section 13906. See 49 C.F.R. 387.313(a)(4). The Form MCS-90 endorsement, the text of which is set out at Pet. App. 40a-43a, provides in part:

> [T]he insurer (the company) agrees to pay, within the limits of liability described herein, any final judgment recovered against the insured for public liability [*i.e.*, liability for injury to persons or property, see note 4, *supra*] resulting from negligence in the operation, main-

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[3] A carrier that is exempt from jurisdiction under Chapter 135 is subject to civil penalties if it fails to comply with applicable financial responsibility requirements, see 49 U.S.C. 31139(f), but it need not submit proof of financial responsibility, as is required for registration.

[4] "Public liability" is defined as "liability for bodily injury, property damage, and environmental restoration." Pet. App. 42a; see 49 C.F.R. 387.5; see also 49 U.S.C. 13906(a)(1) (requiring insurance sufficient to pay judgments for "bodily injury to, or death of, an individual * * * or for loss or damage to property").

> tenance or use of motor vehicles subject to the financial responsibility requirements of sections 29 and 30 of the Motor Carrier Act of 1980 [now revised and reenacted as 49 U.S.C. 13906 and 31139] regardless of whether or not each motor vehicle is specifically described in the policy and whether or not such negligence occurs on any route or in any territory authorized to be served by the insured or elsewhere. Such insurance as is afforded, for public liability, does not apply to injury to or death of the insured's employees while engaged in the course of their employment, or property transported by the insured, designated as cargo. It is understood and agreed that no condition, provision, stipulation, or limitation contained in the policy, this endorsement, or any other endorsement thereon, or violation thereof, shall relieve the company from liability or from the payment of any final judgment, within the limits of liability herein described, irrespective of the financial condition, insolvency or bankruptcy of the insured. However, all terms, conditions, and limitations in the policy to which the endorsement is attached shall remain in full force and effect as binding between the insured and the company. The insured agrees to reimburse the company for any payment made by the company on account of any accident, claim, or suit involving a breach of the terms of the policy, and for any payment that the company would not have been obligated to make under the provisions of the policy except for the agreement contained in this endorsement.

49 C.F.R. 387.15 (Illus. I); Pet. App. 42a-43a.[5]

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[5] The Form as set out in the petition appendix does not reflect amendments effective October 1, 2001, which remove references to the ICC. See 66 Fed. Reg. at 49,873 (amending 49 C.F.R. 387.15, Illus. I).

2. a. Petitioner is an insurance company that provided liability insurance to a federally registered motor carrier, Baljit Sahota, who was doing business under the name Sahota Trucking. See Pet. App. 20a. The policy included, as required, an MCS-90 endorsement. *Id.* at 23a.

Sahota agreed to sell a truck trailer to Garmukh Garcha, doing business as Blue Star Trucking, and Inderjit Singh. Pet. App. 20a. Sahota evidently transferred possession of the trailer to the purchasers, but retained legal title pending full payment of the purchase price. See *id.* at 19a-20a. In late 1995, while driving a truck tractor owned by Blue Star and Singh and pulling the Sahota trailer, Garcha rear-ended a bus owned by respondent Los Angeles County Metropolitan Transportation Authority and driven by respondent Guillermo Nueva. *Id.* at 19a. The collision destroyed the bus and injured respondent Nueva. *Id.* at 3a, 20a.

Respondents sued various defendants, including Sahota, in state court. See Pet. App. 20a. Petitioner evidently paid to defend Sahota in that action, and funded a settlement equal to the statutory financial responsibility requirement for registered vehicle owners in California, which is $15,000 for personal injury and $5000 for property damage. See Resp. Br. in Opp. 4; Cal. Vehicle Code § 16056(a) (West 2000 & Supp. 2001). So far as appears, however, no judgment was ever entered against Sahota. Respondents obtained default judgments against some or all of the remaining defendants, including Garcha (Blue Star) and Singh. See Pet. App. 20a, 28a n.8. According to the courts below, Garcha and Singh are uninsured. *Id.* at 3a, 30a.

b. Petitioner brought the present federal action seeking a declaratory judgment with respect to its duty, under the policy it had issued to Sahota, to indemnify Sahota, Garcha (Blue Star), Singh, or others for liability arising out of the accident. See Pet. App. 3a, 17a-18a. The court granted summary judgment in favor of petitioner. *Id.* at 33a.

The district court first held (Pet. App. 28a-30a) that the Sahota trailer was not covered by the terms of the policy issued by petitioner, because at the time of the accident it was not listed on the schedule of vehicles covered by the policy. See *id.* at 28a. The court concluded that although the MCS-90 endorsement (and a similarly worded endorsement required by state law) would "require [petitioner] to pay any final judgment against its named insured, Sahota, subject to reimbursement by Sahota," it did not "render the trailer a 'covered vehicle,'" and therefore "no 'coverage' [was] available under the policy." *Id.* at 29a-30a. Next, the court considered (*id.* at 30a-33a) the significance of the fact that Garcha and Blue Star were using the trailer with Sahota's permission. The court held (*id.* at 31a) that under the Sahota policy, "permissive users of covered autos are additional insureds, but permissive users of noncovered autos are not." The MCS-90 endorsement and its state analogue do not alter that result, the court explained, because they "do not vary the terms of the policy so as to create 'coverage' where it did not formerly exist." *Id.* at 32a. The court concluded that while the endorsements do provide for "payment of a final judgment, subject to reimbursement," that obligation "is to [the] named in[s]ured alone." *Id.* at 32a, 33a.

3. The court of appeals reversed. Pet. App. 1a-15a. The court first explained that the insurance policy issued by petitioner to Sahota defines "who is an insured" as follows:

> (a) You [the named insured] for any covered auto; [and]
>
> (b) Anyone else while using with your permission a covered "auto" you own, hire or borrow . . . [.]

Id. at 4a-5a (capitalization omitted). The court agreed with the district court that the trailer involved in the accident was not a "covered auto" under the Sahota policy at the time

of the accident, and that Garcha and Blue Star, as permissive users of a non-covered vehicle, are therefore "not 'insureds' per the * * * policy's express terms." *Id.* at 5a. Unlike the district court, however, the court of appeals held that the MCS-90 endorsement "does provide for indemnification under the factual circumstances of this case." *Id.* at 8a. Distinguishing cases involving the duty to defend (rather than to indemnify) or the allocation of responsibility among multiple insurers, see *id.* at 8a-11a, the court pointed out that respondents in this case "are injured members of the public, and thus are [members of] precisely the group meant to be protected by the MCS-90." *Id.* at 10a; see also *id.* at 11a, 14a.

In construing the endorsement, the court of appeals relied upon the analysis in *Adams* v. *Royal Indemnity Co.*, 99 F.3d 964 (10th Cir. 1996). See Pet. App. 11a-15a. *Adams* held that where an insured motor carrier lent a non-covered vehicle to an uninsured driver, the MCS-90 endorsement required the carrier's insurer to satisfy a judgment entered against the driver arising out of an accident involving the vehicle. See *id.* at 11a-12a. The court in this case agreed (*id.* at 13a):

> The critical language in the endorsement is the provision which states that "the insurer agrees to pay . . . any final judgment recovered against the insured for public liability . . . *regardless of whether or not each motor vehicle is specifically described in the policy*[.]" (emphasis added). This language indicates that whatever limitation a policy expresses regarding coverage extending only to "covered" or "specified" autos, this limitation ceases to operate when an injured member of the public seeks indemnification on behalf of the "insured."

The court of appeals reasoned that the endorsement would supersede the normal limitations of the policy and require petitioner to pay a judgment against Sahota—the

named insured—if he caused injury while driving a non-covered auto, and that the effect of the endorsement is therefore "to modify the policy's definition of an 'insured.'" Pet. App. 13a-14a. The court saw "no rational basis for distinguishing," in this regard, between the first part of the policy definition, relating to the named insured, and the second part, relating to permissive users. *Id.* at 14a. "In both cases," the court explained (*ibid.*), "the MCS-90 negates the limitation that only users of 'covered autos' are 'insureds.'" On the facts of this case, the court observed (*id.* at 14a-15a), "Garcha and Blue Star were using the * * * trailer with Sahota's permission at the time of the accident," and "the trailer was, at that time, a regulated vehicle that Sahota owned." Accordingly, the court concluded (*id.* at 15a), "Garcha and Blue Star are 'insureds' under the MCS-90 modification to the Sahota policy," and "[petitioner] is liable to [respondents] for any judgment against Garcha and Blue Star up to the policy maximum."

DISCUSSION

1. The court of appeals' decision is incorrect. It is true, as the court emphasized (see Pet. App. 10a-11a), that the financial responsibility provisions of Title 49 (as they apply to both registered and unregistered carriers) and the Secretary of Transportation's implementing regulations are intended to protect the public in the case of accidents involving vehicles owned or operated by commercial motor carriers. They guarantee, in effect, that there will be resources available (up to the statutory or regulatory responsibility limit) to pay a final judgment obtained by an injured member of the public against a carrier for injury caused by the negligent operation, maintenance or use of a carrier's vehicles—even if the policy itself does not provide coverage in a particular case, and even if the carrier is otherwise insolvent. They also protect the public against

delays in the enforcement of such a judgment that might otherwise result from disputes over coverage between the carrier and its insurer, or between different insurance companies. Contrary to the court of appeals' conclusion, however, existing federal regulations do not require a carrier's insurer to satisfy a judgment entered against any party other than the carrier itself.

a. As explained above (see p. 2, *supra*), Section 13906 of Title 49 conditions federal registration of a commercial (or "for-hire") motor carrier on the carrier's filing with the Secretary proof of insurance (or other security) sufficient to pay, up to a prescribed limit, "for each final judgment *against the registrant* for bodily injury" or property damage "resulting from the negligent operation, maintenance, or use of motor vehicles." 49 U.S.C. 13906(a)(1) (emphasis added). The limitation expressed in the italicized words is repeated in the applicable regulation, 49 C.F.R. 387.301 (see pp. 2-3 & note 3, *supra*), which requires the submission of insurance or other security "conditioned to pay any final judgment recovered *against such motor carrier*" (emphasis added). Essentially the same limiting language is carried over to the MCS-90 endorsement form that the Secretary prescribes for use in complying with both the registration requirements and the similar financial responsibility requirements that apply to all carriers (registered or unregistered). See 49 C.F.R. 387.15. Because, however, that form is designed to be attached to an insurance policy, it provides that the insurer will pay "any final judgment recovered *against the insured.*" In the context of the statutory and regulatory provisions that the MCS-90 form is designed to implement, that language can only sensibly be read to refer to the *named* insured to whom the underlying policy is issued—that is, the motor carrier that must obtain the policy, so endorsed, in order to comply with federal statutory requirements.

If there were any doubt about that construction of the MCS-90 form, it would be resolved by the definitions set out in the Secretary's regulations and by the other uses of the term "insured" within the Form MCS-90 itself. The applicable definitional provision specifies that for purposes of the regulations set out in Sections 387.1-387.17, the term "insured" means "the motor carrier *named* in the policy of insurance" or other security. 49 C.F.R. 387.5, "Insured and principal" (emphasis added). Moreover, the term "the insured" appears in ten other places within the body of the MCS-90 Form. See Pet. App. 40a-43a (reprinting form). One of those occurrences is simply parallel to the use already quoted. *Id.* at 43a ("upon failure of the company to pay any final judgment recovered against the insured"). All the rest, however, are most naturally read to refer only to the named insured, see, *e.g.*, *id.* at 42a ("does not apply to injury to or death of the insured's employees"), and at least three cannot fairly bear any other construction. See *id.* at 41a ("Cancellation of this endorsement may be effected by the company or the insured."); *id.* at 42a (endorsement amends underlying policy "to assure compliance by the insured" with federal financial responsibility requirements); *id.* at 43a (all terms of policy remain "binding between the insured and the company").

Apart from the clarity of the pertinent statutory, regulatory and contractual provisions, limiting the obligation assumed by an insurer under the federal financial responsibility rules to judgments entered against the named insured makes sense for at least two reasons. First, although the federal scheme requires the modification and expansion of typical private insurance contracts, it uses such contracts as its starting point and basic tool (rather than, for example, requiring motor carriers to contribute to a publicly administered fund for the compensation of persons injured by uninsured commercial vehicles). The MCS-90 endorse-

ment requires an insurer to accept liability beyond that which it might accept in a purely private transaction, but it also requires a corresponding agreement by the insured motor carrier to reimburse the insurer for any loss that would not be covered by the underlying policy. See Pet. App. 43a (Form MCS-90). The incremental risk imposed on the insurer is therefore principally the risk that the carrier will not be able to satisfy such a reimbursement obligation. The risk of non-reimbursement is one that an insurer can evaluate fairly easily with respect to prospective named insureds, but not with respect to third parties. Because the statutory and regulatory provisions operate by setting minimum standards for otherwise private insurance arrangements (including, in a few cases, self-insurance), it is far more natural to interpret those provisions to require motor carriers and insurers to include in their private arrangements payment and reimbursement obligations that benefit the public, but run only to each other.

Second, the federal financial responsibility provisions focus on requiring motor carriers to carry adequate insurance to protect the public from risks created by the carriers' own operations. It is central to that purpose to assure that an injured member of the public will be able to recover on a judgment against the carrier, even if the particular vehicle involved in an accident was for some reason not "specifically described in the policy," or was driven on a route the carrier was not authorized to serve, and "irrespective of the financial condition, insolvency or bankruptcy of the insured." See Pet. App. 42a, 43a (terms of Form MCS-90). It is not, however, central to the statutory or regulatory purpose that a member of the public be able to recover from a motor carrier's insurer for a loss that is not covered by the carrier's ordinary insurance policy, and that does not result in any legal judgment against the carrier. If the registered motor carrier is legally responsible—directly, indirectly, or

vicariously—for injuries caused by the operation of one of its vehicles, then it should be possible for the injured party to obtain a judgment against the carrier. The federal financial responsibility provisions were designed to ensure the collectability of any such judgment—not to relieve the injured party from the obligation to obtain a final determination of legal liability (see *id.* at 42a, requiring insurer to pay any "final judgment" for public liability), or to vary the legal rules under which such a determination is to be made.

b. In deciding this case in favor of respondents, the court of appeals ignored the statutory and regulatory provisions described above. The court focused instead on the endorsement's provision that the insurer must pay a judgment "regardless of whether or not each motor vehicle [subject to the financial responsibility provisions] is specifically described in the [underlying] policy." Pet. App. 13a (emphasis omitted). Construing that language in light of the general purpose of the financial responsibility provisions to protect injured members of the public (*id.* at 10a-11a), the court concluded (*id.* at 14a) that "the effect of the MCS-90 endorsement is to modify the policy's definition of an 'insured,'" both with respect to the named insured and with respect to permissive users, by "negat[ing] the limitation [in the policy language] that only users of 'covered autos' are 'insureds.'" That conclusion rests, however, on a fundamental misunderstanding of the endorsement.

Form MCS-90 is not intended, and does not purport, to vary any term of the underlying coverage. To the contrary, the form specifically *preserves* those terms as between the insurer and the named insured. See Pet. App. 43a. The endorsement does require the insurer to pay certain judgments entered against the motor carrier, whether or not the events giving rise to the judgment come within the policy's coverage, and subject to reimbursement by the carrier if they do not. It does not, however, "modify the policy's

definition of an 'insured'" (*id.* at 14a), either with respect to the named insured *or* with respect to permissive users.

If an injured party obtains a judgment against the insured motor carrier (for public liability resulting from negligence with respect to vehicles subject to the financial responsibility requirements), the endorsement requires the insurer to pay the judgment, without regard to coverage under the policy. Conversely, if the injured party obtains a judgment against a defendant other than the insured motor carrier, the insurer may or may not be required to pay that judgment *under the policy*—for instance, if the defendant was driving a "covered auto" with the permission of the named insured, see Pet. App. 4a-5a, 14a—but it will have no obligation to make payment under the endorsement. Thus, the policy and the endorsement, while linked, impose different obligations based on different key determinants: An obligation to indemnify (*i.e.*, pay without reimbursement) based on the policy's coverage of a particular risk, on the one hand, and on the other an obligation to make payment in the first instance, subject to possible reimbursement, based on a final judgment entered *against the motor carrier itself*. The court of appeals erred in confusing those two obligations.

2. The Ninth Circuit in this case relied on and endorsed a similar decision reached by the Tenth Circuit in *Adams* v. *Royal Indemnity Co.*, 99 F.3d 964 (1996). See Pet. App. 11a-14a. *Adams*, like the decision below, erred in construing Form MCS-90 to require an insurer to satisfy a judgment entered against a permissive user of a vehicle not covered by the underlying policy, on the theory that the endorsement "modifie[d] [the term] 'insured' as defined in the basic polic[y]." See *Adams*, 99 F.3d at 970; see also *Pierre* v. *Providence Washington Ins. Co.*, 730 N.Y.S.2d 550 (App. Div. 2001).

Petitioner contends (Pet. 20-25) that the decisions in this case and in *Adams* conflict with decisions of the Third, Fifth,

Eighth, and District of Columbia Circuits. Although we agree that it is difficult to reconcile some of the reasoning in those cases with that of the decision below, the cases petitioner cites are distinguishable from this one in various respects.

In *National Mutual Insurance Co.* v. *Liberty Mutual Insurance Co.*, 196 F.2d 597, cert. denied, 344 U.S. 819 (1952), the D.C. Circuit held that the insurer of a truck owner-driver who had been found liable for an accident could not recover the cost of that judgment from the insurer of the motor carrier that had hired the truck and driver. The court refused to base such liability, which was excluded by the terms of the carrier's policy, on the endorsement then required by the Interstate Commerce Commission—a precursor to the present Form MCS-90, which also provided for the (potentially reimbursable) payment of "any final judgment recovered against the insured" for injuries resulting from negligence in the operation of regulated vehicles. *Id.* at 599. It reasoned that although the endorsement "doubtless would have enured to the benefit of [the injured party], had she chosen to sue [the motor carrier]," it did not "make [the owner-driver] an 'insured' under the [carrier's] policy." *Id.* at 600.

Although that reasoning reflects a proper understanding of the language now incorporated in Form MCS-90, and is inconsistent with the Ninth Circuit's misinterpretation of that form in this case, it did not receive extended consideration from the D.C. Circuit in *National Mutual.* The holding in that case is, moreover, plausibly distinguishable from the holding below, because *National Mutual* involved a dispute over liability between two insurers, rather than a suit by an injured member of the public seeking initial satisfaction of a final judgment arising out of a trucking accident. That contextual point is one that the court below clearly considered significant to its decision, and that the

D.C. Circuit might also consider significant in a future case. Compare Pet. App. 11a (distinguishing cases on ground that "the integral purpose of the MCS-90, to protect third party members of the public, is not implicated in a dispute between two insurers"), with *National Mutual*, 196 F.2d at 598 ("This is a controversy between two insurance companies over which of them shall bear the burden of a loss."). In addition, although the ICC endorsement at issue in *National Mutual* included the "judgment recovered against the insured" language that we think is central to proper resolution of this case, it did not include the specific language—"regardless of whether or not each motor vehicle is specifically described in the policy"—that the Ninth Circuit considered to be the "critical" feature of Form MCS-90. Compare 196 F.2d at 599 with Pet. App. 6a, 13a; see also *Adams*, 99 F.3d at 966, 968, 970. Accordingly, it is unclear whether the D.C. Circuit, if faced with a case identical to this one, would consider the result compelled by the holding or reasoning of *National Mutual*. The same is true, for essentially the same reasons, of the Third Circuit and its decision in *Carolina Casualty Insurance Co.* v. *Insurance Company of North America*, 595 F.2d 128, 135-139 & n.25 (1979).

The other two decisions that petitioner cites (Pet. 21-24) did not, as petitioner acknowledges (see Pet. 23), construe the language of the MCS-90 or its predecessor ICC endorsement. In *Wellman* v. *Liberty Mutual Insurance Co.*, 496 F.2d 131, 136-137 (1974), the Eighth Circuit held that a motor carrier's insurance policy did not by its terms provide for the payment of a judgment recovered against an owner-driver hired by the carrier, where at the time of the accident the driver was not using his vehicle "exclusively in the business of the named insured." The court refused to vary that result on the basis of statutory and regulatory provisions different from those at issue in this case, which provided in general that a carrier that leased a vehicle must

accept legal responsibility for its operation. *Id.* at 138-139; see 49 U.S.C. 304(e)(2) (1970); 49 C.F.R. 1057.4 (1970); cf. 49 U.S.C. 14102(a)(4) (successor provision). In discussing that point, the court referred to the ICC's regulation requiring motor carriers to carry insurance that would pay final judgments recovered "against * * * [the] carrier." 496 F.2d at 138-139 & n.8; see 49 C.F.R. 387.301 (successor regulation). The court reasoned that because the regulation dealing specifically with insurance—essentially the same one that is now implemented using the Form MCS-90—did not require a carrier to carry a policy that would cover judgments rendered against a party other than the carrier, it would "seem[] an unjustified and illogical leap" to hold that the separate legal responsibility provisions allowed recovery directly against the carrier's insurer, when the injured party had not taken the intermediate step of obtaining a judgment against the carrier itself. See 496 F.2d at 138-139.

Similarly, in *White* v. *Excalibur Insurance Co.*, 599 F.2d 50, 55, cert. denied, 444 U.S. 965 (1979), the Fifth Circuit held in part that the legal responsibility provisions relating to leased vehicles could not be invoked to force a carrier's insurer to pay a judgment rendered against a truck driver for negligently causing an accident that killed his fellow driver. In so holding, the court relied on *Wellman* for the proposition that under 49 U.S.C. 315 (succeeded by present Section 13906), "in order for [the insurer] to be liable under the policy filed by [the carrier] with the ICC, [the carrier] must first be adjudicated liable as a party." 599 F.2d at 55.

Like the D.C. Circuit's reasoning in *National Mutual*, the quoted statements from *Wellman* and *White* reflect a proper understanding of statutory and regulatory provisions now implemented in part through Form MCS-90, and to that extent those decisions may be said to conflict with *Adams* and the decision below. Neither decision focused, however, on the financial responsibility provisions, and neither dealt

with the text of a policy endorsement or with the present versions of the relevant statutes and regulations. Thus, as with D.C. and Third Circuits and their decisions in *National Mutual* and *Carolina Casualty*, it is not clear that either the Fifth or the Eighth Circuit would conclude that its precedents foreclose the result reached by the Ninth Circuit on the facts of this case.

3. Although the decision below is incorrect, the importance of the error is unclear. In order for the court's misinterpretation of Form MCS-90 to make a real difference, a registered motor carrier that itself carries proper insurance must first allow use of one of its vehicles (including a vehicle for which it is legally responsible, see, *e.g.*, 49 U.S.C. 14102(a)(4); 49 C.F.R. 376.12(c)(1)) by another party, who causes harm to a member of the public through negligent operation, maintenance, or use of the vehicle. The vehicle in question must be subject to the federal financial responsibility requirements, but for some reason not covered by the ordinary terms of the carrier's policy—a circumstance that the carrier will normally have strong financial (and legal) incentives to avoid. The injured party must then choose (or be able) to obtain a judgment only against the permissive user, not against the carrier (or must obtain a separate and larger judgment running only against the user). Moreover, in order for that result to be unjust, the carrier must have a valid defense that it asserted or could have asserted to avoid legal liability (direct, indirect, or vicarious) for the harm.

These circumstances are not wholly unlikely to occur; and, as petitioner points out (Pet. 27-28), the number of policy endorsements and accidents that could conceivably present the issue is at least theoretically quite large. The issue does not, however, appear to have been litigated with any great frequency in the past, including in the nearly five years between the decisions in *Adams* and in this case.

Moreover, and perhaps most important, the error in both *Adams* and this case is an error in the interpretation of a form promulgated by regulation. It could therefore be fixed through a regulatory proceeding before the Department of Transportation's Federal Motor Carrier Safety Administration, which is the expert agency charged by Congress with administering the provisions of federal law dealing with motor carrier safety. "Any interested person," including petitioner or its amici, could ask the Administrator of the FMCSA to consider the situation and clarify the existing regulations, including Form MCS-90 itself. See 49 C.F.R. 389.31; cf., *e.g.*, *Minimum Levels of Financial Responsibility for Motor Carriers: Environmental Restoration*, 51 Fed. Reg. 33,854 (1986) (interim rule amending definition of "environmental restoration" in 49 C.F.R. 387.5 and 387.15 (Illus. I) (Form MCS-90), adopted "[i]n response to a joint petition filed by the American Insurance Association (AIA) and the American Trucking Associations (ATA)"). The Department of Transportation informs us, however, that it has received no request for regulatory action or, apart from this Court's order in the present case, for further administrative guidance with respect to the proper interpretation of Form MCS-90.

Under these circumstances, we are not persuaded that the court of appeals' erroneous decision in the present case merits plenary review by this Court. We do note, however, that in deciding the case, the court below did not have the benefit of any official expression of the views of the Department of Transportation in construing the endorsement in the Form MCS-90 issued by the Department. Cf. *Auer* v. *Robbins*, 519 U.S. 452, 461-462 (1997). Because those views are now a matter of record, this Court might wish to consider granting the petition, vacating the judgment below, and remanding the case for further consideration in light of the positions expressed in this brief. See *Raquel* v.

Education Mgt. Corp., 531 U.S. 952 (2000); *Statewide Reapportionment Advisory Comm.* v. *Theodore*, 508 U.S. 968 (1993); *Oberly* v. *Baltimore & Ohio R.R.*, 479 U.S. 980 (1986); see also *Slekis* v. *Thomas*, 525 U.S. 1098 (1999).

CONCLUSION

The petition for a writ of certiorari should be denied. In the alternative, the petition should be granted, the judgment of the court of appeals vacated, and the case remanded to that court for further consideration in light of the views expressed herein.

Respectfully submitted.

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IN THE

Supreme Court of the United States

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Petitioner,

v.

GUILLERMO NUEVA & LOS ANGELES COUNTY METROPOLITAN TRANSPORTATION AUTHORITY,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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SUPPLEMENTAL BRIEF FOR PETITIONER

Petitioner John Deere Insurance Company submits this supplemental brief under Supreme Court Rule 15.8 to comment upon the brief *amicus curiae* filed by the United States on January 3, 2002.

The brief of the United States substantially confirms petitioners' arguments in favor of plenary review by this Court. The brief makes clear that the Ninth Circuit's decision, and the Tenth Circuit's identical ruling in *Adams v. Royal Indemnity Co.*, 99 F.3d 964 (1996), are incorrect, U.S. Br. at 9, illustrates that the reasoning of those decisions conflicts with that of four other courts of appeals, *id.* at 15, and agrees with petitioner that the erroneous rule may have significant practical consequences, *id.* at 18. In light of the considered views of the Solicitor General and the Department of Transportation, there is no reason to allow the decision below to stand. This Court should grant the petition and undertake plenary review or summarily reverse. At a minimum, the Court should follow the recommendation of the United States by granting the petition, vacating the judgment below, and remanding for reconsideration in light of the views of the Department of Transportation.

We write principally to address two suggestions made in the United States' brief: (1) that, while the courts of appeals decisions discussed in the petition are inconsistent in their reasoning, they might be distinguishable on certain factual grounds; and (2) that, while the decision below is clearly incorrect, its significance is somewhat unclear. As we explain below, the conflict in reasoning among the courts of appeals decisions leaves no room for consistent results, and the Ninth Circuit's decision below is of substantial significance.

1. Addressing the question for the first time in the brief filed by the United States in this matter, the Department of Transportation ("DOT") has decisively rejected the Ninth and Tenth Circuit's interpretation of the Form MCS-90 En-

dorsement ("MCS-90"). For reasons discussed at length in petitioner's opening and reply briefs, the United States and the DOT are correct, and the Ninth and Tenth Circuits are wrong. The reading of those Circuits ignores the statutes and regulations from which the MCS-90 derives, disregards the only plausible definition of the term "insured," and confuses the basic regulatory structure. U.S. Br. at 10-14. Given the fundamental errors in the Ninth Circuit's reasoning, and the fact that the agency responsible for administering the relevant statutes and regulations has flatly rejected its conclusion, the decision below should not be allowed to stand. This Court should either: grant the petition and set the case for argument and plenary consideration; summarily reverse the Ninth Circuit's opinion; or grant the petition, vacate the judgment, and remand for reconsideration in light of the DOT's analysis of the MCS-90.

2. The United States' brief makes clear that the Ninth Circuit's reasoning, like that of the Tenth Circuit in *Adams*, is irreconcilable with decisions of the D.C., Third, Fifth, and Eighth Circuits.

First, the United States agrees with petitioner that the D.C. Circuit's decision in *National Mutual Insurance Co. v. Liberty Mutual Insurance Co.*, 196 F.2d 597 (D.C. Cir. 1952) reflects a "proper understanding" of the MCS-90 and is "inconsistent with the Ninth Circuit's misinterpretation of that form in this case." U.S. Br. at 15. The United States notes factual distinctions between the cases, but these differences do not minimize the fundamental conflict that remains between them. Although *National Mutual* involved a dispute between insurers, and although the Ninth Circuit considered this a significant point, nothing in the opinion of the D.C. Circuit suggests that that court would consider this a salient distinction warranting a different result. The D.C. Circuit properly interpreted the I.C.C. endorsement and the underlying scheme, and there is no reason to think that a change in

the parties would lead it to reject that reasoning and to adopt a demonstrably incorrect rule disavowed by the DOT. After all, the definition of the word "insured" in the MCS-90 does not vary depending upon whether the dispute is between two insurers or between an insurer and a member of the public.[1]

Second, beyond the factual distinctions discussed with respect to *National Mutual*, the United States offers no additional reason to discount the square conflict between the reasoning of the Ninth Circuit and the Third Circuit's unqualified declaration that "neither the federal motor carrier laws nor the (imputed) ICC endorsement . . . transfer to [the insurer] the duties to defend claims properly brought against others or to pay judgments entered against others." *Carolina Casualty Insurance Co. v. Insurance Company of North America, Inc.*, 595 F.2d 128, 139 (3d Cir. 1979). Because the Third Circuit recognizes that the relevant statute and regulations concerning "motor carriers' financial responsibility, require only that the carrier give security 'to pay any final judgment recovered against such motor carrier,'" and that the regulations say "nothing about payment of judgments recovered against other parties," *id.*, the factual distinctions cited by the United States would provide no principled basis

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[1] The United States also suggests that the D.C. Circuit might reach a different result because the I.C.C. endorsement at issue in *National Mutual* did not contain specific language that is now included in the MCS-90 and that the Ninth Circuit deemed "critical." *See* U.S. Br. at 16 (noting absence of phrase "regardless of whether or not each motor vehicle is described in the policy"). The United States' argument is incorrect. Although the D.C. Circuit did not quote the cited language, *see* 196 F.2d at 599-600, substantially the same phrase did appear in the I.C.C. endorsement then in effect. *See Commercial Standard Ins. Co. v. Robertson*, 159 F.2d 405, 407 (6th Cir. 1947) (quoting language from then-applicable I.C.C. endorsement, including the phrase "regardless of whether such motor vehicles are specifically described in the policy or not"). Thus, the language that the Ninth Circuit deemed "critical" was in fact before the D.C. Circuit. That court's omission of the phrase shows that it did not find that language "critical" to the underlying legal issues, and therefore underscores the basic conflict with the Ninth Circuit.

for the Third Circuit to adopt the discredited reasoning of the Ninth and Tenth Circuits.

Third, though *Wellman v. Liberty Mutual Insurance Co.*, 496 F.2d 131 (8th Cir. 1974), and *White v. Excalibur Insurance Co.*, 599 F.2d 50, 55 (5th Cir.), *cert. denied*, 444 U.S. 965 (1979), did not directly address the text of the MCS-90, those decisions both held that, under the statute from which that endorsement derives, an insurer may be held liable only upon the entry of judgment against the motor carrier named in its insurance policy. This ruling, in cases involving injured members of the public, was essential to the holding of each case, and there is simply no reason to doubt that the Eighth and Fifth Circuits would adhere to their carefully considered views. Indeed, the Fifth Circuit recently reiterated a view of the MCS-90 that flatly conflicts with that of the Ninth Circuit. In *Jackson v. O'Shields*, 101 F.3d 1083, 1085 (5th Cir. 1996), the court described the obligation imposed by the MCS-90 as follows: "Under the Endorsement, Canal [the insurer] undertook to pay any final judgment rendered against J & T Enterprises [the named insured motor carrier]." That characterization confirms that the Fifth Circuit's understanding of the MCS-90 is well-settled and in stark conflict with that of the Ninth Circuit. There is simply no reason to expect that conflict to disappear without the intervention of this Court.

At bottom, the United States recognizes that the cases cited in the petition turn on reasoning inconsistent with the basic analysis of the Ninth Circuit in the case below and the Tenth Circuit in *Adams*. As discussed above and in petitioner's prior submissions, that reasoning is not incidental to the cited cases, and the distinctions noted by the United States do not provide credible grounds for those courts to reject their prior holdings in favor of the views of the Ninth and Tenth Circuits.

3. Although the United States agrees with petitioner that the sheer number of MCS-90 endorsements and accidents involving covered vehicles suggests that the Ninth Circuit's error may arise frequently, it maintains that the "importance of the error is unclear." U.S. Br. at 18. The United States bases this conclusion, at least in part, upon its perception that the precise issue presented has not been litigated with great frequency, and its assumption that the number of past cases is a meaningful indicator of the number of cases likely to arise in future. Petitioner respectfully submits that both the perception and the assumption are mistaken.

Since 1995, at least 26 reported federal opinions, and least 18 reported state opinions, have addressed the proper interpretation of the MCS-90. Among these cases, the exact question presented here – whether a party other than the insured motor carrier is an "insured" under the MCS-90 – has arisen frequently, and formed the basis for a number of decisions. *See Miller v. Harco National Ins. Co.*, 241 F.3d 1331, 1333-34 (11th Cir. 2001) (certifying state law question to Georgia Supreme Court after district court dismissed claim against insurer because judgment had been entered against a related party rather than the named insured carrier); *Adams*, 99 F.3d at 970; *Pierre v. Providence Washington Ins. Co.*, 730 N.Y.S.2d 550 (App. Div. 2001); *St. Paul Fire & Marine Ins. Co. v. Newman*, No. CIV 99-645-AH-C, 2000 WL 1367980, at * (S.D. Ala. Sept. 5, 2000) (adopting alternative argument that "while the regulations require and the MCS-90 endorsement provides coverage for . . . the authorized carrier, the regulations do not extend coverage to [the owner-operator]"); *Lynch, ex rel. Wiley v. Yob*, No. 99-T-062, 2000 WL 1804347, at *2 (Ohio Ct. App. Dec. 8, 2000) (holding that "because neither the owner of the tractor nor the driver fit the definition of 'insureds,' it was error for the trial court to conclude that the MCS-90 endorsement somehow created coverage by broadening the definition of an 'insured.'"); *Madere v. National Union Fire Ins. Co.*, No. CIV.A. 98-

3249, 2000 WL 1593441, at * 8 (E.D. La. Oct. 24, 2000) (holding, in the alternative, that insurer's obligation under the MCS-90 could be triggered by entry of judgment against parties other than the named insured motor carrier); *Del Real v. United States Fire Ins. Crum & Forster*, 64 F. Supp. 2d 958, 964 (E.D. Cal. 1998), *aff'd*, 188 F.3d 512 (9th Cir. 1999); *Progressive County Mut. Ins. Co. v. Carway*, 951 S.W.2d 108, 113 (Tx. Ct. App. 1997) (holding that the motor carrier, not is driver, is an "insured" under the MCS-90); *John Deere Ins. Co. v. Truckin' USA*, No. CIV.A.3:95-CV-1556-D, 1996 WL 734952, at *4 (N.D. Tex. Dec. 10, 1996) (holding that the "'insured' referred to by the endorsement necessarily refers only to the named insured under the Policy"), *aff'd on other grounds*, 122 F.3d 270 (5th Cir. 1997); *Kesler v. Thedford*, 670 So. 2d 467, 471 (La. Ct. App. 1996) (upholding dismissal of insurer because "the motor carrier named in the policy of insurance is clearly not Thedford. Therefore, he is not an insured for purposes of the MCS-90 Endorsement.").

Taken together, these cases make clear that the question presented here arises with considerably frequency, and that the Ninth Circuit's erroneous holding is therefore quite significant. Moreover, the number of cases decided prior to the Ninth Circuit's ruling does not accurately predict the number of cases that are likely to follow it. Before this case, only the Tenth Circuit had taken the view that the MCS-90 could amend the terms of the policy to which it is attached. Because other courts had soundly rejected that position, plaintiffs outside that circuit were likely to take the cautious approach of preserving their claims by suing all possible defendants, including the named insured carriers. But the Ninth Circuit's ruling is likely to provoke the kind of strategic conduct discussed in the petition, Pet. at 26-28, and therefore to spawn much more litigation of this issue.

4. The United States suggests that the Ninth Circuit's error could "be fixed through a regulatory proceeding before the [DOT]." U.S. Br. at 19. But the fact that a court's error may in theory be corrected through regulatory proceedings is no reason for this Court to deny plenary review. Indeed, the availability of relief through regulatory revision has never been an obstacle to review by this Court, which routinely grants petitions for certiorari in cases presenting questions concerning the proper interpretations of federal regulations.

It is entirely appropriate to allow litigants to seek and obtain review by this Court, for regulatory revision would entail a lengthy and costly process that is not certain to yield tangible results. The DOT has taken the position that the underlying regulations are clear and that the meaning of the MCS-90 is apparent from the face of the document, U.S. Br. at 10-13, and therefore may not see the need to revise or clarify its statutory scheme. Moreover, clarification of the MCS-90 through the regulatory process on a prospective basis would not lift the burden of the Ninth Circuit's erroneous ruling for petitioner and other parties now subject to liability thereunder. In short, the fact that an interested party could petition the DOT to revise or clarify the MCS-90 and its accompanying regulations should not deter this Court from granting review to resolve this glaring and important error expeditiously.

CONCLUSION

For the foregoing reasons, and for the reasons previously stated, the Court should grant the petition and undertake plenary review. In the alternative, the Court should grant the petition and summarily reverse the Ninth Circuit, or vacate the judgment below and remand for further consideration in light of the views of the DOT.

Respectfully submitted,

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SUPPLEMENTAL BRIEF

Respondents Guillermo Nueva and Los Angeles County Metropolitan Transportation Authority submit this supplemental brief under Supreme Court Rule 15.8 to comment upon the brief *amicus curiae* filed by the Solicitor General of the United States on January 3, 2002.

Respondents agree with the Solicitor General that the petition before this court should be denied. However, Respondents file this supplemental brief to reinforce several points relied upon by the Ninth Circuit in reaching its opinion below which do not appear to have been adequately considered by the Solicitor General: (1) the clear and unambiguous language of the John Deere insurance policy at issue; (2) the public policy behind the MCS-90 endorsement as expressed in the clear language of the endorsement itself; (3) an apparent misunderstanding of basic coverage and tort law in the motor vehicle context where, in the vast majority of cases, it is the driver (permissive user) at fault and legally liable who is also an "insured" under the basic policy issued to the motor carrier as the owner of the vehicle; and (4) the mandatory California statutes requiring insurance policies to provide coverage for permissive users to the same extent as named insureds, as in the case at bar.

As the Ninth Circuit noted below, the clear and unambiguous policy language set forth in John Deere's insurance policy issued to Sahota expressly defined the term "insured" to include not only the "named insured" but also the permissive users of the named insured's vehicles. The MCS-90 endorsement says expressly that it modifies the policy to require coverage for all owned vehicles, so the limitation in the definition of insured is specifically expanded. Here, it is undisputed that Sahota

(the named insured) granted Garcha (the permissive user) permission to operate Sahota's owned vehicle at the time of the subject accident.

When the express policy language, and endorsement language at issue is plain and unambiguous, there is no need to go outside the express terms to determine the meaning of the phrase "the insured". *Titan Corp. v. Aetna Cas. & Surety Co.*, 22 Cal.App.4th 457, 469 (CA 1994). The express policy language of John Deere's policy issued to Sahota, including the MCS-90 endorsement, clearly define "insured" to include both Sahota (the named insured) and Garcha (the permissive user operating Sahota's vehicle). Unfortunately, in its *amicus curiae* brief, the Solicitor General completely ignored the express policy language at issue.

In an attempt to avoid being bound by the express policy language that John Deere (Petitioner) actually wrote and therefore should be bound by, Petitioner has asserted that there is now a need to go outside the express policy definition of the term "insured" so as to limit that definition to only the "named insured". Petitioner has attempted to convince this Court that there is now a need to look at how the legislature defines the phrase "insured" in the legislation that promulgated the MCS-90 endorsement attachment to the John Deere policy issued to Sahota. There is no such need. The Solicitor General has erred in finding such a need. Under California insurance coverage law, reference is made to drafting history only when there is first found to be an ambiguity. *ACL Technologies, Inc. v. Northbrook Prop. & Cas. Ins. Co.*, 17 Cal.App.4th 1773, 1790-1791 (CA1993). No such ambiguity exists in this language so no reference to drafting history is necessary in this basic contract interpretation.

As the Ninth Circuit below has found, the express language of the MCS-90 endorsement attached to the John Deere policy at issue provides:

> **In consideration of the premium stated in the policy to which this endorsement is attached,** the insurer (the company) agrees to pay, within the limits of liability described herein, any final judgment recovered against the insured for public liability resulting from negligence in the operation, maintenance, or use of motor vehicles subject to the financial responsibility requirements of Sections 29 and 30 of the Motor Carrier Act of 1980 **regardless of whether or not each motor vehicle is specifically described in the policy.** . . . It is understood and agreed that no condition, provision, stipulation, or limitations contained in the policy, this endorsement, or any other endorsement . . . shall relieve the company from liability or from the payment of any final judgment, within the limits of liability herein described, irrespective of the financial condition, insolvency or bankruptcy of the insured. **However, all terms, conditions, and limitations in the policy to which this endorsement is attached shall remain in full force and effect as binding between the insured and the company.** (Emphasis added).

The clear, unambiguous, and express language of the MCS-90 endorsement at issue and the clear legislative intent as set forth directly in that endorsement is to maintain all definitions of the term "insured" as defined in the underlying policy, while expanding the policy provision to include all vehicles owned by the insured, even if not specifically described in the policy. Unfortunately, the Solicitor General did not even address this express

language of the MCS-90 endorsement in its Brief. However, this was clearly relied upon as well by the Ninth Circuit in reaching its decision below.

In the case at bar, Respondents obtained a final judgment against Garcha, Sahota's permissive user, while operating a vehicle owned by Sahota. Pursuant to the express language of both the John Deere policy and the MCS-90 endorsement, Petitioner is obligated to pay those final judgments.

Moreover, Petitioner collected an **additional premium** from Sahota for the **expansion of coverage** provided by the MCS-90 endorsement. The MCS-90 endorsement at issue was obviously meant to expand the underlying policy coverage – not limit the coverage to a more restricted definition of the term "insured" than that set forth in the underlying insurance policy itself.

Further, with respect to this Court's response to the petition, Petitioner's brief asserts that there is a circuit conflict which the Supreme Court should resolve. As set forth in Respondents' opposition brief, the few cases cited by Petitioners either involve inter-insurer disputes which are irrelevant here, or involve completely different issues or endorsements.[1] There are two circuit decisions which are in complete agreement with each other. No circuit split exists that needs resolving.

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[1] The United States notes the cases involving inter-insurer conflict and that a court might also consider this significant in a future case (U.S. Br. at 15-16), while Petitioner's Supplemental Brief suggests that this is not a "salient distinction." On the contrary, as set forth in Respondents' Opposition Brief at pg. 15, there are extensive cases finding this distinction very salient. If one insurer has a direct obligation, and the second insurer only has an obligation if the MCS-90 is applied, there is no need to

Petitioners also assert that this case involves an issue that is important and recurring. As the United States pointed out in its brief, the circumstances here are very unique and they have not been litigated with any great frequency in the past, or since the decisions in this case or the *Adams v. Royal Indemnity*, 99 F.3d 964 (10th Cir. 1996) case. (U.S. Br. at 18.) Further, regulatory proceedings are available to repair any error in interpretation. (U.S. Br. at 19.)

Respondents therefore request this Court to deny the petition. Respondents believe that even if the Ninth Circuit was instructed to review its decision, it would have to apply California statutory provisions to these issues and rule in favor of Respondents yet again under state law rather than federal law.

Petitioners and *amicus curiae* give little more than a token nod to the admitted public policy of the MCS-90 endorsement, to protect the general public from uninsured vehicles used by interstate carriers. This policy would be completely frustrated if this Court holds that the MCS-90 endorsement does not apply to judgments against anyone except the named insured motor carrier. This would provide specific incentive for motor carriers to simply give permission to others to use their vehicles, but not purchase insurance for the vehicles. If an accident occurs, the public is out of luck. Most states limit an owner's indirect or vicarious liability to the minimum financial responsibility limits, disallowing judgments against motor carriers beyond a minimal $15,000 for

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find expanded coverage because the public is already protected by the insurer with a direct obligation. Those cases do not apply here.

bodily injury and $5,000 for property damage. If there is an accident, the owner's limits are probably less than insurance premiums would have been.

Public policy requires protection of the public. This policy is not addressed if the MCS-90 endorsement is limited in the way Petitioners request.

The United States believes that it is not central to the regulatory purpose to cover judgments against anyone other than the motor carrier itself. It argues that if the motor carrier is "legally responsible – directly, indirectly, or vicariously", then the plaintiff could obtain a judgment against the motor carrier. As noted, in vehicle accidents, it is rare that the motor carrier is directly at fault – it is the drivers (permissive users) who are at fault. Occasionally, one will find a motor carrier has negligently maintained a vehicle or negligently hired a driver with a poor driving record. In those cases, the usual state statutes limiting an owner's liability to minimal levels do not apply. The motor carrier "insured" has direct liability. Thus, plaintiffs can obtain a judgment directly against the motor carrier.

The negligent liability of the drivers is what the public must concern itself with. Because the motor carrier's legal liability for its driver's acts is vicarious and is limited to minimal levels, the MCS-90 endorsement would add nothing if applied as the United States suggests. Further, the MCS-90 endorsement specifies that it covers liability for "negligence in the operation, maintenance of use of motor vehicles." Motor carriers cannot be negligent in operation and use, as corporations do not operate a vehicle – only the driver can. This language becomes redundant and meaningless if the United States'

interpretation that only judgments against the motor carrier matter were to stand.

It is drivers who are negligent and drivers from whom the public must be protected. Most policies, including the John Deere policy at issue here, add the drivers as permissive user-insureds, because the policy would rarely apply if the drivers were not insureds. The policy defines "insured" as both the named insured motor carrier and anyone else using a covered auto you own with your permission. Interpreting the MCS-90 endorsement as the United States and Petitioner argue as only applying to the motor carrier is much more restrictive than the policy it is supposed to expand upon. The endorsement repeatedly uses the phrase, "the insured" and Petitioners want this to mean only the motor carrier or the named insured. In the context of insurance policies, the named insured is the entity listed on the declarations [face] page of the policy. But it is not the only insured. All policies have a section entitled something on the lines of "Who Is An Insured." That section in the John Deere policy defines "insured" to include permissive users. The John Deere policy which incorporates the MCS-90 endorsement, like every other insurance policy, uses the phrase "insured" dozens, if not hundreds of times. In each instance, the word "insured" includes permissive users. All the drivers of Sahota's covered vehicles are "insureds" under the John Deere policy by its very terms. Why would an endorsement attached to a policy use "the insured" differently than it is defined in the same policy? The MCS-90 endorsement specifically states that "all terms, conditions, and limitations in the policy to which the endorsement is attached shall remain in full force and effect as binding between the insured and the

company." The MCS-90 endorsement contains several definitions, notably none for "insured." Thus, the simple answer is that the John Deere policy's definition of "insured" which include permissive users is the definition that applies.

The Solicitor General mistakenly notes at pg. 10 that the MCS-90 endorsement can only "sensibly be read to refer to the named insured." The Solicitor General unfortunately does not understand insurance coverage law. As set forth above, it is not sensible to interpret an MCS-90 endorsement to an insurance policy as only covering judgments against a named insured when the policy itself is broader than that. It is not sensible and it is not sound regulatory interpretation.

This leads to Respondents' final point. California state law, as well as the law of every state of which Respondents are aware, mandates that insurance policies cover permissive users in the same manner as they cover named insureds. The public policy reason for this is the same as that of the ICC when it promulgated the MCS-90 endorsement. That is, it is drivers who are largely at fault and the public needs to be protected from negligent drivers by making sure that they have insurance covering them.

The government never addressed California state law in its brief. Insurance Code § 11580.1, set forth in App. 1 to Respondents' opposition brief, provides specifically that all policies must insure permissive users of "any owned or leased motor vehicles" in the same manner as it insures the owner.

The Ninth Circuit Court of Appeal's decision did not reach state law because it did not need to; it ruled in Respondents' favor under federal law. If this Court

remands this case to the Ninth Circuit with instructions to follow the government's brief, the simple fact is that the Ninth Circuit can do that, but will still rule in favor of Respondents under California state law.

Section 11580.1 applies to vehicles "covered by the policy." The MCS-90 endorsement states that it applies to all motor vehicles "regardless of whether or not each motor vehicle is specifically described in the policy. . . . " The MCS-90 endorsement's public policy is to make sure that any and all vehicles owned by the motor carrier, whether he drives it himself or allows others to do so, are covered by the MCS-90 endorsement.

In addition, the John Deere policy issued to Sahota also contains a California endorsement similar to the MCS-90 endorsement. Neither the District Court nor the Ninth Circuit reached any conclusion regarding this endorsement. The DOT's interpretation of the MCS-90 endorsement has no bearing whatsoever on California's interpretation of its own PUC endorsement. It can be expected that California regulators would be inclined to protect the members of the public by interpreting its endorsement in conjunction with its express statutes requiring permissive user coverage.

The law now requires that John Deere pay the final judgments entered against Sahota's permissive user and then collect reimbursement for it from Sahota, who purchased insurance from John Deere. The MCS-90 endorsement's only purpose is to expand coverage beyond that of the policy. If it is limited to the policy language, it has no effect. It expands coverage to all vehicles owned by the motor carrier and driven by anyone. It covers judgments

rendered against anyone regarding that vehicle, including the one person most likely in 99% of cases to have a judgment against him – the permissive user/driver.

This petition should be denied and the Ninth Circuit ruling left intact.

Respectfully submitted,

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